No. 86-1432

In The

Supreme Court of the United States

October Term, 1986

ELIZABETH A. GOBLA,

Petitioner,

vs.

CRESTWOOD SCHOOL DISTRICT, WILLIAM SMODIC and THEODORE J. GEFFERT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RALPH E. KATES, III
Attorney for Petitioner
15 North Main Street
Third Floor
Wilkes-Barre, Pennsylvania 18711
(717) 824-9374

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QUESTIONS PRESENTED FOR REVIEW

1. Under the principles of *Chevron Oil Co. v. Huson,* 404 U.S. 97 (1971), should the new limitations selection rule announced in *Wilson v. Garcia,* 105 S. Ct. 1938 (1985), be applied retroactively to alter the applicable period of limitation in a 42 U.S.C. § 1983 and § 1985 case which had gone to jury verdict at the time *Wilson* was decided?[1]

2. Does the new limitations rule announced in *Wilson v. Garcia,* 105 S. Ct. 1938 (1985), incorporate state judicial approaches regarding commencement and tolling of their individual statutes of limitations for personal injuries?[2]

3. Should defendants and the trial court be permitted to raise the affirmative defense of a specific statute of limitations post-verdict which was neither pleaded nor raised by the defendants or the court prior to verdict?

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1. Writs of certiorari have been granted on closely analogous questions in: *Goodman, et al. v. Lukens Steel Company et al.,* docket no. 85-1626 (*cert. granted,* December 2, 1986) and *Al-Khazraji v. St. Francis College,* 107 S. Ct. 62 (*cert. granted,* October 6, 1986). A petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit is pending on this question in: *Vodila v. Roderick Clelland,* 86-700 (cert. petition filed October 29, 1986.)

2. A petition for writ of certiorari to the United States Court of Appeals for the Third Circuit has been filed on this issue in: *Sanford Bernstein v. Commonwealth of Pennsylvania, et al.,* docket no. 85-1691 (cert. petition filed April 15, 1986).

PARTIES TO THE PROCEEDINGS

Petitioner Elizabeth Gobla was the plaintiff in the District Court and the appellant in the Court of Appeals. Crestwood School District, William Smodic and Theodore Geffert were defendants in the District Court and appellees in the Court of Appeals. The Crestwood School District is a minor governmental unit in Luzerne County, Pennsylvania. William Smodic was the superintendent of schools for the Crestwood School District. Theodore Geffert was and is the principal of the Crestwood high school. The following individuals were members of the Crestwood school district and named defendants in the District Court who were voluntarily dismissed by plaintiff at the conclusion of discovery: Esther Wheeler, Louise Phipps, Judy Jastremskis, John Williams, William Rawls, Harold Richards, Eric Aigeldinger, Charles Sieminski and George Baab.

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No.

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Elizabeth Gobla (hereinafter "plaintiff" or "Mrs. Gobla") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit dated October 22, 1986, insofar as the Court of Appeals permitted the District Court to apply the recent decision in *Wilson v. Garcia,* 105 S. Ct. 1938 (1985), and held that plaintiff's civil rights claims under 42 U.8.C. § 1981 and 1985, are time-barred by Pennsylvania's two year statute of limitations. 42 Pa.C.S. § 5524.

OPINIONS BELOW

The Court of Appeals did not issue an opinion regarding rehearing. Its order denying rehearing and rehearing in banc is contained in the Appendix at 1a. The Court of Appeals did not issue an opinion affirming the judgment of the District Court. A copy of the Third Circuit's order affirming the District Court's judgment is contained in the Appendix at 3a. The opinion of the District Court for the Middle District of Pennsylvania is reported at 628 F. Supp. 43 (M.D. Pa. 1985) and is reproduced in the Appendix in its typescript format at 5a.

JURISDICTION

The judgment of the Court of Appeals denying petitioner's motion for rehearing and rehearing in banc was entered on December 5, 1986. The judgment of the Court of Appeals affirming the decision of the District Court was entered on October 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 42 U.S.C. § 1983; 42 U.S.C. § 1985; 42 Pa.C.S. § 5522(b)(1); 42 Pa.C.S. § 5524; 42 Pa.C.S. § 5524(2) and 42 Pa.C.S. § 5527. The foregoing statutes are reproduced in the appendix at 52a-62a.

STATEMENT OF THE CASE

On March 18, 1985, a jury responded to special interrogatories and returned a verdict in favor of plaintiff Mrs. Elizabeth Gobla. The jury found as follows: Mrs. Gobla had been discharged by the defendants from her position as a tenured public school teacher because of her exercise of her First Amendment rights; the

defendants would not have discharged her absent the exercise of those First Amendment rights; and the defendant high school principal (Theodore Geffert) had sexually harassed Mrs. Gobla (*see* Appendix at 18a). The jury verdict resulted from a trial consisting of eight days of testimony from 18 witnesses providing 1,600 pages of trial transcript and almost 1,000 pages of trial exhibits. As a result of the jury verdict, Mrs. Gobla, who allegedly had been discharged for insubordination, was able to recoup some of her lost reputation in the small Pennsylvania community that comprises the Crestwood School District. Mrs. Gobla, a lifetime resident of the school district, was the first person to be discharged in the history of the Crestwood School District.

Mrs. Gobla's ordeal began on September 12, 1978, when the Crestwood School District delivered to her a notice of termination listing 35 charges of insubordination. They charged her with insubordination for, among other things, speaking with newspapers about improprieties taking place within the district. Mrs. Gobla was a tenured faculty member of the Crestwood School District at this time. After a hearing before the school board on those charges, Mrs. Gobla was discharged on November 1, 1978. The Pennsylvania State Education Association, a statewide representative of elementary and secondary teachers, appealed the decision of the Crestwood School Board to the Pennsylvania Secretary of Education and the Pennsylvania Commonwealth Court. At each level, the reviewing authority found that there was sufficient evidence on the record to uphold the decision of the school board and denied the appeal.[3]

Unfortunately, neither the Pennsylvania Secretary of Education nor the Pennsylvania Commonwealth Court had the advantage of information possessed by the assistant principal of

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3. The decision of the Secretary of Education was dated April 12, 1979. The Commonwealth Court decision was filed May 27, 1980. *See Gobla v. Board of School Directors of Crestwood*, 51 Pa. Cmwlth. Ct. 539, 414 A.2d 772 (1980).

the Crestwood high school, Mary Redgate. On February 13, 1981, Mary Redgate disclosed for the first time that school superintendent, William Smodic, high school principal, Theodore Geffert and herself began meeting to plan the ouster of Mrs. Gobla. The meetings began shortly after Mrs. Gobla reported to the superintendent that the high school principal, Theodore Geffert, was receiving a $12 kick-back for each high school class ring sold by a particular ring company. She made this report directly to Superintendent Smodic. What Mrs. Gobla was not aware of at the time was that defendants Smodiac and Geffert had been jointly meeting with a respresentative of the ring company involved to position this company as the exclusive official supplier of class rings to the high school.[4]

After the first newspaper article appeared quoting Mrs. Gobla's criticism of the school board, the frequency of meetings among the school administrators to plan the ouster of Mrs. Gobla intensified. These meetings were coordinated with meetings of school board members. As part of their plan to oust Mrs. Gobla from her teaching position, the individual defendants substantially increased the monitoring of Mrs. Gobla's classroom activities, imposed requirements on her that were not imposed on other teachers and, in an effort to secure her dismissal, presented false testimony at her dismissal hearing.[5] Their plan succeeded until

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4. At trial, the defendants asserted that the purpose of these meetings was to formulate "specifications" for class rings. Given other evidence on this issue at trial, including testimony of an admission by high school principal, Geffert, of receipt of kick-backs in 1977, the jury found the "specifications" explanation untenable.

5. We identified a specific critical instance of false testimony by defendant Geffert at the dismissal hearing. In connection with charge no. 23 against Mrs. Gobla (refusing to release a student from class for a job interview), defendant Geffert testified on October 3, 1978 (the dismissal hearing) that a job interview

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Mrs. Redgate broke the conspiracy and disclosed the existence of the plan and the meetings to Mrs. Gobla on February 13, 1981.[6]

The complaint in this action was filed on June 4, 1982, within two years of the date of this disclosure by assistant principal, Mary Redgate, and within six years of the date of Mrs. Gobla's dismissal from the Crestwood School District.[7]

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was scheduled with this student for possible summer employment with the Human Resources Program. The supposedly laudatory purpose for releasing the student was the subject of extensive questioning by the school district's counsel and was one of the bases for the discharge of Mrs. Gobla by the school board. We were able to locate the student involved and produce him at trial where he testified unequivocally that he was the student removed from Mrs. Gobla's class, that no job interview had been scheduled for him, that he could not financially qualify for summer employment with the Human Resources Program and that the apparent purpose of his unexpected removal from Mrs. Gobla's class was for defendant Geffert to question him regarding Mrs. Gobla's teaching techniques. His identity had not been volunteered by the defendants at the dismissal hearing. He did not testify at the dismissal hearing and had not been contacted concerning Mrs. Gobla's dismissal prior to our contact for trial testimony. He had spent the intervening years in the U.S. Navy.

6. Mrs. Redgate's willingness to talk was not altruistic in nature. She was having a dispute with the school board at that time which eventually resulted in her dismissal as assistant principal.

7. Prior to *Wilson v. Garcia*, 105 S. Ct. 1938 (1985), the Third Circuit applied Pennsylvania's six year contract statute of limitations (42 Pa.C.S. § 5527) to equal protection claims arising out of employment relationships based on a contract, *Fitzgerald v. Larson*, 741 F.2d 32 (3d Cir. 1984); *Knoll v. Springfield Twp. School District*, 699 F.2d 137 (3d Cir. 1983); *Skehan v. Board of Trustees of Bloomsburg State College*, 590 F.2d 470 (3d Cir. 1978), *cert. denied*, 444 U.S. 832. This approach was consistent with Pennsylvania's long history of providing a six year statute of limitations for protection of contract rights and economic loss. *Haefele v. Davis*, 399 Pa. 504, 160 A.2d 711 (1960), cited with approval in *Meyers v. Pennypack Home Ownership Assoc.*, 559 F. 2d at 903 (3d Cir. 1977); *Grim v. CNA Financial Corp.*, 8 D. & C. 3d 447 (1978).
(Cont'd)

In response to the complaint, the individual defendants filed a motion to dismiss raising Pennsylvania's governmental suit statute which allows only six months for instituting legal proceedings against a public official [42 Pa.C.S. § 5522(b)(1)]. (*See* Appendix at 50a.) No other statute of limitations issue was raised on behalf of the individual defendants and no statute of limitations issue was raised on behalf of the defendant Crestwood School District.

When the motion to dismiss, based on the six month statute of limitations was denied, an answer was filed on behalf of all defendants. The answer raised no affirmative defenses (*see* Appendix at 43a).

The defendants filed subsequent motions to dismiss the complaint on December 20, 1983 and February 2, 1984. Neither of those motions raised any statute of limitations defense.

On March 4, 1985, the defendants filed a motion to dismiss that portion of the complaint relating to allegations of sexual harassment. The only asserted basis for this motion was Pennsylvania's six year contract statute of limitations (42 Pa.C.S. § 5527). This motion was not briefed by defendants and was filed immediately prior to the initiation of jury selection.[8]

Between the time of the filing of the first defense motion to dismiss and the initiation of jury selection, the parties had gone

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See also, the Official Source Note to 42 Pa.C.S.A § 5527 which discusses the 250 year tradition for a six year statute of limitations to protect these rights in Pennsylvania. 1 Sm. L. 76, Act of March 27, 1713.

8. Local Rule 401.5 of the United States District Court for the Middle District of Pennsylvania requires the filing of a brief as a prerequisite to judicial consideration of the motion.

through extensive pre-trial discovery which involved: several thousand pages of documents, approximately two dozen depositions, more than a dozen sets of interrogatories, two sets of requests for admissions, numerous attorney pre-trial conferences on authentication of documents, several trans-Atlantic telephone conferences with witnesses, one trans-Atlantic deposition and hundreds of pages of pre-trial motions and briefs occasioned by defense filings.[9]

At the conclusion of the plaintiff's case-in-chief at trial, the defendants presented the court with a motion for directed verdict consisting of five typed pages (*see* Appendix at 36a). Once again, defendants did not raise Pennsylvania's two year personal injury statute of limitations. That motion was denied by the trial court. At the conclusion of all the trial evidence, the defendants renewed their prior motion for directed verdict. Again, defendants did not raise Pennsylvania's two year personal injury statute of limitations. That motion was, likewise, denied by the trial court. The defendants offered no evidence at trial to support the affirmative defense of Pennsylvania's personal injury statute of limitations and made no effort to amend their pleadings to assert this affirmative defense at trial.[10]

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9. The repetitive motions filed by defendants included: five motions for summary judgment raising identical legal issues, one motion in limine, one motion to exclude witnesses and testimony and numerous affidavits. Throughout all of this, none of the defendants raised Pennsylvania's personal injury statute of limitations, 42 Pa.C.S. § 5524.

10. From the initiation of this litigation, Mrs. Gobla consistently asserted that the individual defendants acted in concert to oust her from her tenured teaching position, were motivated by a desire to silence her and actively worked to withhold this information from her. Under these circumstances, it was imperative that the defendants assert this statute of limitations defense in a timely manner. Factual issues surrounding when Mrs. Gobla could have reasonably discovered the violation of her civil rights and whether or not the

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After the jury returned a verdict in favor of the plaintiff, the defendants filed a motion for judgment notwithstanding the verdict and/or a new trial (*see* Appendix at 23a). That filing by defendants did not include any reference to Pennsylvania's two year personal injury statute of limitations. It was not until post-trial motions had been briefed by the parties that this Court's decision in *Wilson v. Garcia,* 105 S. Ct. 1938 (1985), was handed down. It was raised to the District Court in a supplemental post-verdict brief. The District Court, apparently correctly anticipating the Third Circuit's approach to this matter, selected Pennsylvania's personal injury statute of limitations on behalf of the defendants, applied *Wilson v. Garcia, supra,* retrospectively, vacated the jury verdict and entered judgment in favor of defendants.

The Third Circuit affirmed the District Court's decision without opinion. The Third Circuit denied a petition for rehearing and rehearing in banc without opinion[11] (*see* Appendix at 1a).

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD DETERMINE THE SCOPE OF THE RETROACTIVE APPLICATION, IF ANY, OF *WILSON V. GARCIA*, 105 S. Ct. 1938 (1985).

This Court has already set forth a method of analysis for determining the retrospective application of its own decisions in

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defendants' affirmative efforts at concealment tolled the statute, could not be explored in pre-trial discovery or at trial because the defendants withheld asserting this defense until this Court's decision in *Wilson* altered the post-verdict environment.

11. Adding financial insult to the civil rights injury suffered by my client, the Third Circuit imposed costs of the appeal on Mrs. Gobla.

Chevron Oil Company v. Huson, 404 U.S. 97 (1971). Also, this Court has already agreed to consider the retroactive application of *Wilson v. Garcia, supra*, in *Goodman v. Lukens Steel, supra*, and *Al-Khazraji v. St. Francis College, supra*.[12]

This petition, however, serves to highlight the need for this Court to speak more clearly regarding the parameters of retroactivity of this Court's decisions.

The three-tiered approach of *Chevron* requires judicial analysis on a case-by-case basis. Unfortunately, at least within the Third Circuit, analysis has been replaced by rigid retroactive applications of *Wilson*.[13] The need for additional guidance is

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12. We incorporate by reference the position asserted on behalf of those plaintiffs opposing retroactive application of *Wilson v. Garcia* where the effect is to shorten a limitations period in pending claims.

13. The Third Circuit first applied *Wilson v. Garcia, supra*, retroactively in *Smith v. City of Pittsburgh*, 764 F. 2d 118 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 349 (1985). Application of Pennsylvania's two year statute of limitations to Mr. Smith's claim was appropriate under the factual and legal circumstances of that case. First, the City of Pittsburgh had "consistently maintained" that Smith's claim was barred by Pennsylvania's two year statute of limitations, 764 F.2d at 196. Second, the City's legal position applying the two year limitations period was consistent with applicable Third Circuit precedent. Mr. Smith was asserting a violation of his procedural due process rights (dismissal without a hearing). The Third Circuit had consistently applied a two year statute of limitations to procedural due process claims, as all the cases cited by the Third Circuit in support of its decision in *Smith* indicated. *See Kelly v. City of Philadelphia*, 552 F. Supp 574, 577 (E.D. Pa. 1982), *aff'd. mem.*, 725 F.2d 668 (3d Cir. 1983) (failure to provide a pre-termination hearing); *Mazur v. Department of Revenue*, 516 F. Supp. 1328, 1332 (M.D. Pa. 1981), *aff'd mem.*, 681 F.2d 807 (3d Cir. 1982) (no property interest or liberty interest involved in the claim); *West v. Williamsport Area Community College*, 492 F. Supp. 90, 98 (M.D. Pa. 1980) (failure to provide a pre-termination hearing); *Eubanks v. Clarke*, 434 F. Supp. 1022, 1029-30 (E.D. Pa. 1977) (transfer of a mental patient without a hearing). However, when substantive due process rights and/or

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obvious when jurists of equal learning and integrity, applying the same judicial precedent, reach such contrary conclusions as has occurred in the retrospective application of *Wilson v. Garcia, supra*. The fact is that Mrs. Gobla would be returned to her tenured faculty position in the Crestwood School District if she resided within the United States Court of Appeals for the Sixth Circuit,[14] the Seventh Circuit[15], the Ninth Circuit[16] or the Tenth Circuit.[17]

II.

THIS COURT SHOULD DETERMINE WHETHER OR NOT THE USE OF STATE STATUTES OF LIMITATIONS INCORPORATES STATE JUDICIAL INTERPRETATIONS OF COMMENCEMENT AND TOLLING OF THOSE STATUTES.

Normally, the date on which a federal civil rights cause of

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equal protection claims were involved, the Third Circuit traditionally utilized other statutes of limitations. *See Fitzgerald v. Larson*, 741 F.2d at 36 (1984). Unfortunately, since *Smith*, the Third Circuit has failed to "weigh the merits and demerits in each case". *Chevron, supra; Linkletter v. Walker*, 381 U.S. 618, 629 (1965). Powered by its decision in *Smith*, the Third Circuit has propelled itself into unswerving retrospective application of *Wilson* to pending claims. Now, the Third Circuit has applied *Wilson* retroactively to Mrs. Gobla after a jury has returned a verdict finding her constitutional rights to have been violated and when the personal injury statute of limitations was not seasonably raised by the defendants.

14. *See Carroll v. Wilkerson*, 782 F.2d 44 (6th Cir. 1986).

15. *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986).

16. *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986); *Rivera v. Green*, 775 F.2d 1381, 1384 (9th Cir. 1985).

17. *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984) (in banc); *Abbitt v. Franklin*, 731 F. 2d 661 (10th Cir. 1984) (in banc). Further, this court in *Wilson* noted without disapproval that the Tenth Circuit had already decided not to apply *Wilson* retroactively. 105 S. Ct. at 1941, n. 10.

action accrues and the limitations period begins to run is determined by federal law. *Cope v. Anderson*, 331 U.S. 461, 464 (1947); *Deary v. Three Un-named Police Officers*, 746 F.2d 185, 197 n. 16 (3d Cir. 1984).

When this Court incorporated state personal injury statutes of limitations into Section 1983 claims, the Court left open the question of whether or not state judicial interpretations of their own statutes of limitations were part and parcel of the newly federalized time limits.

Pennsylvania's approach to the accrual and tolling of statutes of limitations is consistent with the general federal law.[18]

Pennsylvania courts have long held that, where a plaintiff cannot discover with reasonable diligence the nature of the injury to him, the two year statute of limitations will not act to bar a cause of action. *Lewey v. Fricke Coke Co.*, 166 Pa. 536, 31 A. 261 (1895); *Ayers v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959); *Schaffer v. Larzellere*, 410 Pa. 402, 189 A.2d 267 (1963); *Taylor v. Tukanowicz*, 290 Pa. 581, 435 A.2d 181 (1981); *Stanio v. Johns-Manville Corp., et al.*, 304 Pa. Super. 280, 450 A.2d 681 (1982); *Cathcart v. Keene Industrial Insulation*, 324 Pa. Super. 123, 471 A.2d 493 (1984).

There are two steady streams to this "discovery rule" of Pennsylvania's two year personal injury statute of limitations:

1. The factual inability to know or "discover" that some

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18. In the criminal conspiracy context, this Court has held that the statute of limitations runs from the last overt act during the existence of the conspiracy. *Fiswick v. United States*, 329 U.S. 211, 216 (1946). This approach is fairly uniform among the Circuits in federal civil conspiracy actions. *Wells v. Rockefeller*, 728 F.2d 209 (3d Cir. 1984); *Buford v. Tremayne*, 747 F.2d 445 (8th Cir. 1984); *Blackwelder v. Millman*, 522 F.2d 766 (4th Cir. 1975); *Bergschneider v. Denver*, 446 F.2d 569 (9th Cir. 1971).

proscribed conduct of the defendants has caused her harm [*Acker v. Palena,* 260 Pa. Super. 214, 393 A.2d 1230 (1978)]; and

2. The active concealment of relevant and material information from the plaintiff as to the proscribed nature of the defendants' conduct. *Nesbitt v. Erie Coach Co.*, 416 Pa. 89, 96, 204 A.2d 473 (1964).

Here, both streams merge to toll the commencement of the limitations period and estop these defendants from asserting any statute of limitations defense which they may otherwise have had. The defendants actively asserted that the discharge of Mrs. Gobla was not for the exercise of her free speech rights in contacting the newspapers and in reporting the existence of a kick-back scheme relating to high school rings. Until assistant principal Redgate divulged the existence of concerted activities on the part of the defendants to oust Mrs. Gobla, Mrs. Gobla had no way of knowing the illegal motivations behind her discharge. If Mrs. Gobla were involved in a personal injury action utilizing Pennsylvania's two year statute of limitations, that statute would have been tolled during the furtherance of the conspiracy. If this same statute of limitations is to be applied to this case, there is no principled justification for declining to provide Mrs. Gobla with the full measure of protection afforded by Pennsylvania courts to bodily injury victims. This Court should provide clear guidance to the federal judiciary regarding the commencement and tolling of statutes of limitations in civil rights cases.

III.

THIS COURT SHOULD DETERMINE WHETHER OR NOT CIVIL RIGHTS DEFENDANTS AND TRIAL COURTS CAN ASSERT AFFIRMATIVE DEFENSES POST-VERDICT WHICH WERE NEITHER PLEADED NOR RAISED PRIOR TO VERDICT.

Throughout the pendency of this claim the defendants have

raised a variety of affirmative defenses. These included: collateral estoppel, res judicata, Pennsylvania's six month governmental immunity statute of limitations and Pennsylvania's six year contract statute of limitations. At no time, however, did the defendants raise Pennsylvania's two year bodily injury statute of limitations.[19] The collateral estoppel, res judicata and six month statute of limitations arguments were rejected by the court pre-trial. The defendants argued the applicability of Pennsylvania's six year statute of limitations at trial, but were unsuccessful, there being no evidence to support their position. As a result, the defendants requested no instruction on Pennsylvania's six year statute of limitations and requested no special interrogatory to the jury on this issue. The defendants waived the statute of limitations by their conduct and conscious decision not to raise it in a timely manner.

It was not until an unsolicited brief on post-verdict motions that the defendants first mentioned Pennsylvania's two year personal injury statute of limitations to the trial court and the plaintiff. Despite the requirements of Rules 8, 12, 15 and 50 of the Federal Rules of Civil Procedure, the trial judge considered Pennsylvania's two year statute of limitations for the first time in the post-verdict context. In doing so, the trial judge asserted that once any statute of limitations issue is raised by a defendant, it is up to the court to select the appropriate statute. 628 F. Supp. at 46.[20]

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19. If the defendants had desired to raise Pennsylvania's personal injury limitations period, it was available to them. After all, it was raised by the City of Pittsburgh in *Smith*, by St. Francis College in *Al-Khazraji*, by Lukens Steel Co. in *Goodman* and by the Springfield Township (Pennsylvania) School District in *Knoll* during the same time the instant defendants chose not to assert it.

20. Little imagination is required to appreciate the absurdity of the attempted reach of the trial court's statement when even a small sample of

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Apparently, the trial judge felt that his advocacy was not

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Pennsylvania's statutes of limitations applicable to civil cases is examined. Suggesting that a defense pre-trial filing which asserts any one of these statutes, affords the trial judge the opportunity to apply any other of these statutes, exceeds acceptable bounds of judicial discretion:

TYPE OF ACTIONS	PERIOD	PA STATUTE REFERENCE
CONTRACT		
Action Founded on Contract Obligation or Liability Founded Upon a Writing	4 years	42 Section 5525
Contract Implied in Law Not Otherwise Covered	4 years	42 Section 5525
Express Contracts Not Founded Upon an Instrument in Writing	4 years	42 Section 5525
Instruments in Writing Under Seal (Notwithstanding 42 Section 5525(7)	20 years	42 Section 5529
Municipal Authorities Construction, Reconstruction and Repair	1 year after cause of action accrued	53 Section 312
Sale, Construction or Furnishing of Tangible Personal Property or Fixtures	4 years	42 Section 5525
GOVERNMENT		
Specific Performance of Contract of Sale of Real Property or for Damages for Non-compliance Therewith	5 years	42 Section 5526
Action Against Officer for Anything Done in Execution of Office	6 months	42 Section 5522

(Cont'd)

restricted by the rules of pleading which apply to civil rights

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TYPE OF ACTIONS	PERIOD	PA STATUTE REFERENCE
Action Against Officer for Nonpayment of Money or Non-Delivery of Property	2 years	42 Section 5524
Action by Commonwealth, County or Institution District to Recover Maintenance of Public Charges Including Mental Patients	no limit	42 Seciton 5531
Civil Penalties and Forfeitures Generally	2 years	42 Section 5524
Claims Against Board of Claims	6 months after claim arises	72 Section 4651-6
Legislative Code of Ethics	2 years following discovery by agency head or Ethics Committee of the General Assembly or 4 years after the occurrence whichever period is shorter	46 Section 143.7
PROPERTY		
Abandoned and Unclaimed Property Actions Against Holders	15 years	72 Section 1301.16

(Cont'd)

defendants. The decision of the trial judge in this regard is

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TYPE OF ACTIONS	PERIOD	PA STATUTE REFERENCE
Action for Possession	21 years	42 Section 5530
Personal Property Execution Against After	20 years	42 Section 5529
Entry of Judgment Taking, Detaining or Injuring, Including Actions for Specific Recovery	2 years	42 Section 5524
Action Against Attorney on Behalf of Client to Enforce Implied or Resulting Trust	no limit	42 Section 5531
Enforcement of Equity of Redemption or Implied or Resulting Trust as to Real Property	5 years	42 Section 5526
Payment of Ground Rent	21 years	42 Section 5530
Trespass	2 years	42 Section 5524
Waste	2 years	42 Section 5524
TORTs		
Actions to Recover Damages for Injury to Person or Property Which are Founded on Negligent, Intentional or Otherwise Tortious Conduct or Any Other Action Sounding in Trespass, Including Deceit or Fraud, Not Otherwise Covered	2 years	42 Section 5524
Assault	2 years	42 Section 5524
Battery	2 years	42 Section 5524

(Cont'd)

unusually unfortunate because there are a number of factual issues surrounding the commencement and tolling of the personal injury statute of limitations in this case. Since the personal injury statute of limitations was not raised as an affirmative defense prior to or at the trial, these factual issues were not explored.The effect of the trial court's action was to place the defendants in the enviable position of securing both the benefits of the unpleaded affirmative defense, and the positive assistance of all factual presumptions relating to commencement and tolling of the statute—even after a jury verdict against them. This new approach to judicial activism in affirmative defenses in the Third Circuit is contrary to the position adopted in other Circuit Courts of Appeals. *See Peterson v. Airlines Pilot Associated International,* 759 F.2d 1161 (4th Cir. 1985); *Trinity Carton Company v. Falstaff Brewing Corp.,* 767 F.2d 184, 193-94 (5th Cir. 1985); *Evans v.*

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TYPE OF ACTIONS	PERIOD	PA STATUTE REFERENCE
False Arrest	2 years	42 Section 5524
False Imprisonment	2 years	42 Section 5524
Invasion of Privacy	1 year	42 Section 5523
Libel	1 year	42 Section 5523
Malicious Abuse of Process	2 years	42 Section 5524
Malicious Prosecution	2 years	42 Section 5524
Personal Injury	2 years	42 Section 5524
Slander	1 year	42 Section 5523
Wrongful Death	2 years	42 Section 5524

Syracuse City School District, 704 F.2d 44 (2d Cir 1984).[21] However, it is consistent with the general hostility toward civil rights cases indicated by the Third Circuit's imposition of more restrictive pleading requirements on civil rights' plaintiffs than on plaintiffs in other civil actions. *See Frazier v. SEPTA,* 785 F.2d 65 (3d Cir. 1986); *Rotolo v. Borough of Charleroi,* 532 F.2d 920 (3d Cir. 1976). Of course, it is one thing to require heightened specificity in an initial pleading where there is an opportunity to amend. But it is quite another matter for the court to permit the initial assertion of an affirmative defense to occur post-verdict; and then, through judicial magic, relate the unasserted affirmative defense back to the initial defense pleading, judicially amending the latter to include the former. The mere assertion of judicial power in this manner is too thin a reed to support the construction of this belatedly asserted affirmative defense.

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21. The Third Circuit's position in this case is at variance with its general position that practices and procedures mandated by the Federal Rules of Civil Procedure will not be available to construct defenses in the post-trial environment. *See Abraham v. Perkarski,* 728 F. 2d 167 (3d Cir. 1984), *cert. denied,* 104 S. Ct. 3513 (1984). The Third Circuit's position in this case harkens back somewhat to the position adopted by that court in *Weaver v. Bowers,* 657 F.2d 1356 (3d Cir. 1981). However, this case is substantively distinguishable from the issue faced by the Third Circuit in *Weaver.* In *Weaver,* the effect of the belatedly asserted affirmative defense was to attack the substantive legal sufficiency of the complaint, not the procedural timeliness of its filing. Here, only the latter is involved. This is not a case where the statute of limitations can be said to affect the subject matter jurisdiction of a federal court. *See KSLA TV Inc. v. Radio Corp. of America,* 732 F.2d 441 (5th Cir. 1984). Even in *Weaver,* the Third Circuit affirmed its traditional adherence to the strictures of the federal rules in dicta: "We take this occasion to reiterate that all litigants must strictly observe the time requirements imposed by the Federal Rules of Civil Procedure; we limit our decision to the unusual situation at hand." 657 F.2d at 1362. That self-imposed limitation to the "unusual situation" appears to have been ignored in this case. [*See also,* the companion case to *Weaver, Marino v. Bowers,* 657 F.2d 1363 (1981).]

CONCLUSION

Petitioner respectfully requests that this petition be granted and that this Court issue a writ of certiorari to the United States Court of Appeals for the Third Circuit.

In the alternative, petitioner requests that this Court withhold action on this petition until decision is rendered in *Al-Khazraji v. St. Francis College,* (docket no. 85-2169) and *Goodman v. Lukens Steel,* (docket no. 85-1626) with regard to the retroactive application of *Wilson v. Garcia* and then remand this case for further consideration by the Circuit Court.

With regard to the second issue identified in this petition, petitioner respectfully requests that this petition be considered with *Bernstein v. Commonwealth of Pennsylvania,* (docket no. 85-1691) and be granted.

Respectfully submitted,

RALPH E. KATES, III
Attorney for Petitioner

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PLAINTIFF'S MOTION FOR REHEARING DATED DECEMBER 5, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5675

GOBLA, ELIZABETH A.

v.

CRESTWOOD SCHOOL DISTRICT, and SMODIC, WILLIAM; GEFFERT, THEODORE J.; WHEELER, ESTHER; PHIPPS, LOUISE; JASTREMSKI, JUDY; WILLIAMS, JOHN; RAWLS, WILLIAM; RICHARDS, HAROLD; ALGELDINGER, ERIC, SIEMINSKI, CHARLES; BAAB, GEORGE; Individually and as Members of the Crestwood School Board

ELIZABETH A. GOBLA,

Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civ. No. 82-0699)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, *Circuit Judges.*

Appendix A

The petition for rehearing filed by Elizabeth A. Gobla, appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ A. Leon Higginbotham
Circuit Judge

Dated: December 5, 1986

APPENDIX B — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AFFIRMING THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED OCTOBER 22, 1986

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5675

GOBLA, ELIZABETH A.

v.

CRESTWOOD SCHOOL DISTRICT, and SMODIC, WILLIAM; GEFFERT, THEODORE J.; WHEELER, ESTHER; PHIPPS, LOUISE; JASTREMSKI, JUDY; WILLIAMS, JOHN; RAWLS, WILLIAM; RICHARDS, HAROLD; ALGELDINGER, ERIC, SIEMINSKI, CHARLES; BAAB, GEORGE; Individually and as Members of the Crestwood School Board

ELIZABETH A. GOBLA,

Appellant

Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 82-0699)
District Judge: Hon. William J. Nealon, Jr.

Argued: June 6, 1986

Before: ADAMS, WEIS and HIGGINBOTHAM, *Circuit Judges.*

Appendix B

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

s/ A. Leon Higginbotham
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: October 22, 1986

Costs taxed in favor of Crestwood School District, et al, Appellees as follows:

Total of Brief.....$181.90

Certified as a true copy and issued in lieu of a formal mandate on December 15, 1986.

Test: s/ M. Elizabeth Ferguson
Chief Deputy Clerk,
U.S. Court of Appeals
for the Third Circuit.

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA OVERTURNING A JURY VERDICT IN FAVOR OF PLAINTIFF AND ENTERING JUDGMENT IN FAVOR OF DEFENDANT DATED SEPTEMBER 19, 1985

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 82-0699

ELIZABETH GOBLA,

Plaintiff

v.

CRESTWOOD SCHOOL DISTRICT, et al.,

Defendants

MEMORANDUM AND ORDER

This action was originally filed by plaintiff on June 4, 1982, in which she alleged violations of 42 U.S.C. §§ 1983, 1985 and the Pennsylvania Equal Riqhts Amendment pursuant to her discharge as a school teacher from the Crestwood School District. Trial by jury began March 4, 1985 and on March 18, 1985, the jury returned a verdict in favor of plaintiff in the amount of $135,000.00. In special interrogatories, the jury found that plaintiff's exercise of her First Amendment right of free speech was a substantial or motivating factor in her discharge, and that, although she was sexually harassed, the harassment was not a substantial or motivating factor in her discharge on November

1, 1978. By Motion dated March 25, 1985, defendants filed for a judgment notwithstanding the verdict alleging, *inter alia*, that there was insufficient evidence to support a verdict.

During this period, the United States Supreme Court handed down the decision of *Wilson v. Garcia*, 105 S.Ct. 1938 (1985). Because the court believed that the *Wilson* case was dispositive of the issue in the instant action, the parties were requested to file supplemental briefs addressing the applicability of *Wilson*. The briefs having been filed,[1] defendants' motion is now ripe for disposition. For the reasons set forth below, the motion for judgment notwithstanding the verdict will be granted and the verdict entered in favor of plaintiff will be vacated.

I. FACTS

Because the issue presented involves the affirmative defense of the Statute of Limitations, a recitation of the factual background of the case is necessary. Plaintiff was suspended from her teaching position at Crestwood High School on March 13, 1978. After a hearing, the Board of School Directors voted to dismiss plaintiff on November 1, 1978. The stated grounds for dismissal, all related to her teaching duties, were, *inter alia*, insubordination, failure to submit medical certification for absence, and failure to submit lesson plans. The majority of charges related to incidents of insubordination. Plaintiff took an appeal to the Pennsylvania Secretary of Education who sustained the dismissal. Plaintiff then appealed the decision of the Secretary to the Pennsylvania Commonwealth Court which upheld the Secretary's decision by an opinion rendered May 27, 1980. *See* 51 Commw. Ct. 539 (1980). On June 2, 1982, plaintiff sought

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1. *See* Documents 205, 207 and 209.

relief in this court alleging that she was dismissed for exercising her First Amendment right of free speech and that she had been sexually harassed up until October, 1977 while teaching at Crestwood High School.[2] *See* Affidavit of Elizabeth Gobla, Document 124 of the Record, Exhibit B at 38. Defendants responded to the complaint by filing a Motion to Dismiss arguing that plaintiff's cause of action was barred by the Pennsylvania Statute of Limitations, 42 Pa. Cons. Stat. Ann. § 5522(b)(1), and that her action was barred by the doctrines of estoppel and res judicata.

By Memorandum and Order dated September 30, 1983, this court denied defendants' Motion to Dismiss. The court held, *inter alia*, that defendants' statute of limitations argument failed in light of the recent decision handed down by the Court of Appeals for the Third Circuit in *Knoll v. Springfield Township School District*, 699 F.2d 137 (3d Cir. 1983). In *Knoll*, our Court of Appeals determined that Pennsylvania's residuary six-year statute of limitations should be applied because it would better serve the federal policy underlying federal civil rights actions than would the shorter six-month statute of limitations governing employment discrimination actions brought against government officials. *Knoll*, however was vacated and remanded by the Supreme Court, *see* 105 S. Ct. 2065, in light of the Court's recent decision, *Wilson v. Garcia*.

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2. Plaintiff had never raised these issues before the School Board, the Secretary of Education or the Commonwealth Court. Her principal argument before the Commonwealth Court was that because some of the incidents charged in her dismissal proceedings occurred prior to her earlier March, 1978 suspension hearings, those incidents could not form part of the basis for her dismissal. These items, plaintiff contended, were unlawful double punishment for the same conduct. 51 Commw. Ct. 539 (1980).

Appendix C

II. DISCUSSION

This court must consider the effect of the Supreme Court's decision in *Wilson*. In *Wilson*, the Court held that claims brought pursuant to 42 U.S.C. § 1983 are best characterized as personal injury actions and, thus, the state statute of limitations for personal injury actions must be applied uniformly to all Section 1983 actions. In Pennsylvania, the statute of limitations for personal injury actions is two years. 42 Pa. Cons. Stat. Ann. § 5524(2).

After *Wilson v. Garcia*, our Court of Appeals addressed the issue of retrospective application of *Wilson* in *Smith v. City of Pittsburgh*, 764 F.2d 188 (3d Cir. 1985). After careful consideration, our Court of Appeals determined that *Wilson v. Garcia* should be applied retrospectively. In *Smith*, the court concluded that:

> Given the uncertainty of the Pennsylvania limitations provisions, the absence of a definitive holding of this court applying the six-year statute to a claim of termination of employment without due process, and the support in the district court opinions for concluding that the six-month or two-year Pennsylvania limitations periods might apply, there was no clear precedent on which it would have been reasonable for [plaintiff] to rely in delaying filing suit for more than two years.

Fitzgerald v. Larson, 741 F.2d 32, No. 83-3493, slip. op. at 7 (3d Cir., August 5, 1985) (citing *Smith, supra* at 14-15). In *Smith*, the plaintiff had argued that he had been dismissed in violation of his right to procedural due process. In the case, *sub judice*, however, plaintiff has alleged she was discharged in violation of

her First Amendment rights. Our Court of Appeals has addressed this issue as well in *Fitzgerald v. Larson, supra* and held that *Wilson v. Garcia* applied retrospectively to claims alleging wrongful discharge for exercise of First Amendment rights.

With the law clearly set forth, the court turns to plaintiff's arguments which resist a finding that her claim is time-barred. Plaintiff's first argument is that *Wilson v. Garcia* should not be given retrospective application. This argument is clearly foreclosed by the Third Circuit's decisions in *Smith* and *Fitzgerald, supra.*

Plaintiff's remaining arguments require more discussion. First, it is argued that defendants did not raise the affirmative defense of the Statute of Limitations in a timely manner,[3] and second, that plaintiff filed her complaint within the two-year Pennsylvania personal injury statute of limitations. *See* 42 Pa. Cons. Stat. Ann § 5524(2). The court will address these issues *seriatim.*

Plaintiff argues that defendants have waived raising the two-year statute of limitations pursuant to 42 Pa. Cons. Stat. Ann. § 5524 because defendants only raised the six-month statute of limitations pursuant to 42 Pa. Cons. Stat. Ann. § 5521(b). *See* Document 3 and 8 of the Record. Thus, plaintiff's argument is that by raising only that a six-month statute of limitations was

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3. Plaintiff also contends that only the individual defendants, as individuals and members of the Crestwood School Board, raised the defense of the Statute of Limitations and Crestwood School District, as a defendant, did not raise the defense. The court notes, however, that any liability that could be imposed upon the School District is necessarily dependent upon the liability of the individual defendants. If no action may be sustained against the individual defendants and the Crestwood School Board, then there is no viable action left against the School District.

applicable to the action, defendants are now precluded from asserting that a two-year limitations period should be applied.

The court is not persuaded by this argument. The cases plaintiff cites in support are inapposite in that those cases involved a situation in which the defendant failed to plead the affirmative defense at all or failed to raise the defense until just before or during trial. *See e.g., Peterson v. Air Line Pilots Assoc. Internat.*, 759 F.2d 1161 (4th Cir. 1985); *Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 461 F.2d 66 (3d Cir. 1972); *Evans v. Syracuse City School District*, 704 F.2d 44 (2d Cir. 1984).

Before *Wilson* was decided, the first step in selecting the applicable state statute of limitations was to characterize the essential nature of the federal action. *Wilson v. Garcia*, 731 F.2d 640, 642 (10th Cir. 1984), *aff'd* 105 S.Ct. 2065 (1978) (citations omitted). The court then has to determine which state limitations period is applicable to this characterization. *Id.* This court does not interpret the analysis as restricting the court to choose only the limitations period advanced by the parties. Rather, once the issue of the statute of limitations period has been raised, the *court* makes the determination of the appropriate limitations period. For example, the defendants in *Garcia* raised a two-year limitations period as a defense in the district court. The district court, however, held that a four-year limitations period was more appropriate. *Wilson, supra* 731 F.2d at 651. On appeal, the Tenth Circuit court held a three-year personal injury limitations period should apply in Section 1983. Thus, the court is not bound to choose only the particular limitations period advanced by the parties. Rather, the *court* chooses the applicable period after appropriate analysis, once the issue has been raised. Because defendants raised the statute of limitations as a defense immediately, they are free to re-assert that defense in light of the fact that the precedent this

court relied upon has been vacated. *See Knoll, supra.* The court rejects plaintiff's argument that defendants are limited to asserting only a six-month limitations period.[4]

Having concluded that defendants are not barred from raising the statute of limitations period, the court turns to plaintiff's second argument that her claims were timely filed.

A. First Amendment

As stated *infra*, the Third Circuit Court of Appeals held that the two-year statute of limitations should be applied retrospectively to claims of wrongful discharge. Plaintiff urges this court to find that her First Amendment claim was timely filed, in that she did not discover she was fired for outspokenness until February 13, 1981. According to plaintiff, she was unaware of any First Amendment issue until it was disclosed to her by Mary Redgate on February 13, 1981. A careful review of Redgate's trial testimony, however, reveals that Redgate offered no support to plaintiff's theory that she was fired for exercising her right to free speech, *viz.* speaking out on kick-backs of school rings or writing to the newspaper criticizing the School Board.[5] Rather,

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4. This conclusion is buttressed by the reasoning of the *Wilson v. Garcia* court in holding that all Section 1983 actions should be subject to the state's personal injury statute. The purpose of the decision was to establish uniformity, at least within a state, regarding civil rights actions—a purpose clearly defeated by plaintiff's reasoning.

5. Plaintiff seizes on the language in the Memorandum and Order dated September 30, 1983, *see* Document 29 of the Record, in which the court stated, with regard to defendants' *res judicata* argument: "The plaintiff's allegations, as well as the Redgate deposition, *indicate* that plaintiff was not aware of the

(Cont'd)

Redgate's testimony did not even address these issues and was directed principally to her part in collecting harmful data on plaintiff's teaching activities which ultimately were utilized by the School Board to support plaintiff's discharge. Thus, the court does not find persuasive evidence that the statute of limitations period should be tolled under these circumstances. The burden of establishing that the statute of limitations should be tolled is placed upon the party asserting it. Plaintiff has not set forth any factual support for her allegation that she was unaware of her First Amendment claim. As a result, her cause of action accrued on the date of her discharge, November 1, 1978. Because plaintiff did not file her federal action until June 4, 1982, her action is time-barred pursuant to *Wilson v. Garcia* and *Fitzgerald v. Larson, supra.*

B. Sexual Harassment

Plaintiff's claim for sexual harassment is also time-barred in that by plaintiff's own account, all harassment stopped

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(Cont'd)
alleged constitutional violations until 1981, well after the Commonwealth had rendered its decision." *Id.* at 7 (emphasis added). That statement, however, was in the context of a motion for summary judgment whereby all the well-pleaded allegations of plaintiff were taken as true and all doubts resolved in favor of plaintiff. At this point in time, however, a trial has been completed and the parties have presented all of their evidence. The evidence presented at trial demonstrated that the free speech issue, upon which plaintiff prevailed before the jury, was fully known to her at the time of her discharge. The ring incident occurred in May, 1976, *see* Gobla Affidavit and Chronology, Volume 1, Document 124 of the Record at 19 and the newspaper article on March 28, 1978, *id.* at 74, well in advance of her discharge on November 1, 1978. There is simply no evidence that Mary Redgate's discussion with plaintiff in February, 1981 informed plaintiff of a First Amendment claim.

in October, 1977. *See* Affidavit of Elizabeth Gobla, Document 124 of the Record, Exhibit B at 38.[6] Thus, her claim for sexual harassment is barred as well. Moreover, the jury decided against the plaintiff on the issue of sexual harassment, finding that the harassment was not a substantial or motivating factor in her discharge.

C. Conspiracy

To the extent plaintiff may be arguing that her conspiracy claim is still viable, that argument is rejected. Defendants are correct in maintaining that plaintiff is foreclosed from advancing this claim. Because testimony was minimal on this issue, the court did not submit the issue to the jury. Plaintiff did not object and pursuant to Fed.R.Civ.P. 49(a), she is precluded from asserting the conspiracy claim is still viable. Additionally, the verdict in favor of plaintiff was premised solely on the free speech issue which was unrelated to any class-based or gender-based animus.

III. CONCLUSION

In conclusion, the court finds that defendants timely asserted the defense of the statute of limitations. In light of *Wilson v. Garcia* and *Fitzgerald v. Larson, supra,* plaintiff's claims of First Amendment violations and sexual harassment are time-barred. It is unfortunate that after a verdict is entered by a jury, it must be set aside. This court is constrained, however, to follow

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6. Plaintiff in oral argument maintained that the court cannot consider this information because it was not introduced at trial. There is no merit to this argument. Plaintiff cannot urge the court to disregard submissions filed by the plaintiff as of record which were entitled "Gobla Affidavit, Chronology and Exhibits."

controlling case law of the United States Supreme Court and United States Court of Appeals for the Third Circuit. The verdict in favor of plaintiff and against defendants will be vacated.

An appropriate Order will enter.

s/ William J. Nealon
Chief Judge, Middle District
of Pennsylvania

DATED: September 19, 1985

Appendix C

ORDER

In accordance with the reasoning set forth in the accompanying Memorandum, IT IS HEREBY ORDERED THAT the jury verdict entered in favor of plaintiff is vacated and judgment is entered in favor of the defendants.

s/ William J. Nealon
Chief Judge, Middle District
of Pennsylvania

DATED: September 19, 1985

APPENDIX D — JURY'S SPECIAL INTERROGATORIES AND VERDICT IN FAVOR OF PLAINTIFF DATED MARCH 18, 1985

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 82-0699

ELIZABETH A. GOBLA

V.

CRESTWOOD SCHOOL DISTRICT and THEODORE J. GEFFERT & Wm. Smodic

CHIEF JUDGE WILLIAM J. NEALON

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict. BY SPECIAL INTERROGATORIES (copy attached)

IT IS ORDERED AND ADJUDGED

That judgment on compensatory damages be and hereby is entered in favor of plaintiff Elizabeth A. Gobla and against defendants Crestwood School District and Theodore J. Geffert and William Smodic.

APPROVED: s/ William J. Nealon
WILLIAM J. NEALON, CHIEF JUDGE

Appendix D

CLERK
DONALD R. BERRY

(BY) DEPUTY CLERK
MARY E. PAMELIA, CHIEF DEPUTY s/ Mary E. Pamelia

DATE MARCH 18, 1985

Appendix D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

NO. 82-0699 CIVIL

ELIZABETH A. GOBLA,

Plaintiff

v.

CRESTWOOD SCHOOL DISTRICT, et al.,

Defendants

SPECIAL INTERROGATORIES

1. Did plaintiff, Elizabeth Gobla, prove by a preponderance of the evidence that her First Amendment right of free speech was a substantial or motivating factor in her discharge on November 1, 1978?

YES X NO __

2. Did plaintiff prove by a preponderance of the evidence that defendant, Theodore Geffert, sexually harassed her while she was a teacher in the Crestwood School District?

YES X NO __

3. If the answer to Interrogatory 2 is YES, was this sexual harassment a substantial or motivating factor in her discharge on November 1, 1978?

Appendix D

YES __ NO X

If Interrogatories 1 and 2 are both answered NO, proceed no further and judgment will be entered for the defendants.

If Interrogatories 1 and 3 are both answered NO, proceed no further and judgment will be entered for the defendants.

4. If Interrogatory 1 is answered YES, did defendant prove by a preponderance of the evidence that plaintiff would have been discharged in any event for reasons other than violations of her Constitutional rights?

YES __ NO X

5. If Interrogatories 2 and 3 are answered YES, did defendant prove by a preponderance of the evidence that plaintiff would have been discharged in any event for reasons other than violations of her Constitutional rights?

YES __ NO __

If the answers to Interrogatories 4 and 5 are YES, then proceed no further and judgment will be entered for the defendants.

If the answer to either Interrogatory 4 or 5 is NO, then proceed to Interrogatory 6 and assess the damages to be awarded to her.

6. What is the amount of plaintiff's damages?

Compensatory $135,000.00
Punitive -0- (as to defendant Geffert only)

Appendix D

Judgment will be entered for plaintiff in the above amount.

s/ Frank Lukasik
Foreperson

Dated: March 18, 1985

APPENDIX E — AMENDED JUDGMENT IN FAVOR OF PLAINTIFF DATED MARCH 19, 1985

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO. 82-0699

ELIZABETH A. GOBLA

V.

CRESTWOOD SCHOOL DISTRICT and THEODORE J. GEFFERT & WILLIAM SMODIC

CHIEF JUDGE WILLIAM J. NEALON

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict. BY SPECIAL INTERROGATORIES (copy attached)

IT IS ORDERED AND ADJUDGED

AMENDED JUDGMENT

That judgment entered on March 18, 1985 which granted compensatory damages to plaintiff Elizabeth A. Gobla and against defendants Crestwood School District and Theodore J. Geffert and William Smodic be amended to include the amount of the compensatory damages which is in the total sum of $135,000.00.

APPROVED: s/ William J. Nealon
WILLIAM J. NEALON, CHIEF JUDGE

Appendix E

CLERK
DONALD R. BERRY

(BY) DEPUTY CLERK
MARY E. PAMELIA, CHIEF DEPUTY s/ Mary E. Pamelia

DATE MARCH 19, 1985

APPENDIX F — DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT AND/OR MOTION FOR A NEW TRIAL FILED MARCH 25, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-0699

ELIZABETH A. GOBLA,

Plaintiff

vs.

CRESTWOOD SCHOOL DISTRICT et al,

Defendants

The defendants, Crestwood School District, William J. Smodic and Theodore J. Geffert, move the Court to set aside the Order entered in the above entitled action on March 18, 1985 and to enter judgment in favor of the Defendants pursuant to the Motion of the Defendants for a directed verdict. The Motion of the Defendants for a directed verdict should have been granted because of the following:

1. That a Complaint was filed by the Plaintiff, Elizabeth Gobla on June 4, 1982 against the Crestwood School Board Members, Esther Wheeler, Louise Phipps, Judy Jastremski, John Williams, William Rawls, Harold Richards, Eric Aigeldinger, Charles Sieminski and George Baab, Individually, and also against Theodore J. Geffert, Principal of Crestwood High School, William J. Smodic, Superintendent of Crestwood School District and the Crestwood School District.

Appendix F

2. The Complaint was grounded upon an alleged violation of the Plaintiff's first amendment right to free speech, harassment and alleged conspiracy to present false witnesses and false testimony against her in her dismissal proceedings.

3. On or about May 8, 1984 the Plaintiff voluntarily dismissed the action as to School Board Members, Esther Wheeler, Louise Phipps, Judy Jastremski, John Williams, William Rawls, Harold Richards, Eric Aigeldinger, Charles Sieminski and George Baab, as individuals and Board Members and Crestwood School Board.

4. That the defendants made various pre-trial motions which are incorporated herein and made a part of these post-trial motions as if more fully set forth in detail.

5. The trial by jury was commenced before the Honorable Chief Judge William J. Nealon on March 4, 1985.

6. That the said defendant made various objections at trial on the admission of certain testimony.

7. That the said defendants by and through their counsel moved for a directed verdict at trial at the conclusion of the plaintiff's case and also at the conclusion of all testimony.

8. That on March 18, 1985, the jury in this said case returned a verdict in favor of the plaintiff in the sum of One Hundred Thirty-five Thousand ($135,000.00) Dollars. Attached to this Motion and made a part of these Motions is a copy of the verdict and special interrogatories answered by the jury.

Appendix F

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

9. The defendants incorporate paragraphs 1 through 8 inclusive, as if more fully set forth in detail:

10. The defendants motion for judgment notwithstanding the verdict should be granted because as a matter of law there was no evidence to submit to the jury that the plaintiff's first amendment right to free speech were violated nor was there any evidence to show that plaintiff was sexually harassed nor was there any evidence to show the existence of a conspiracy on the part of the defendants to submit false testimony or false witnesses in the termination proceedings against the plaintiff. The evidence in the case established that:

a. The plaintiff made public statements after she was notified that she was to receive a hearing on a charge of insubordination for failing to follow a sign-in procedure established by the School Board and these statements taken as a whole pertain to plaintiff's personal interest and did not address matters of public concern except peripherally.

b. The plaintiff was discharged from her position as a teacher in the Crestwood School District because of numerous violations of rules and regulations of the School District some of which occurred after she made her public statements and these violations clearly constituted insubordination.

c. The plaintiff appealed her discharge to the Secretary of Education of the Commonwealth of Pennsylvania and ultimately to the Commonwealth Court

of Pennsylvania. Both of these appellate bodies affirmed the decision of the School Board.

d. At no time during her employment as a teacher in the Crestwood School District did the plaintiff complain to anyone about the alleged sexual harassment by defendant Geffert.

e. The plaintiff did not raise the issue of sexual harassment when she appealed her dismissal to the Secretary of Education or to the Commonwealth Court of Pennsylvania.

f. The plaintiff did not mention the alleged harassment to anyone including her husband and her sister.

g. There is no evidence of the existence of a conspiracy nor is there any evidence that the defendants Smodic and Geffert in concert with Mary Redgate secured false witnesses or false testimony to be used in the proceedings of termination against the plaintiff Elizabeth A. Gobla.

11. In addition to the foregoing, this Court should also grant defendants motion for judgment notwithstanding the Verdict because:

A. There was no evidence before this Court or there is insufficient evidence before this Court to warrant a finding that the Defendants:

a. Harassed or in any way discriminated against the plaintiff because of her sex;

b. Harassed the plaintiff because she exercised her rights to free speech;

c. Terminated the plaintiff because of her sex;

d. Terminated the plaintiff because of the exercise of her First Amendment rights.

B. There was no evidence before this Court or there was insufficient evidence to warrant a finding that the alleged exercise of the plaintiff's First Amendment rights involved protected speech, because most of the content of the letter to the Board Members involved matters of plaintiff's personal concern rather than public concern.

C. There was no evidence before this Court or there was insufficient evidence before this Court to warrant a finding that the plaintiff was sexually harassed by Theodore J. Geffert.

D. There was no evidence before this Court or there was insufficient evidence before this Court to warrant a finding that there is any causal link between plaintiff's discharge and her exercise of her right to free speech.

E. *There was no evidence before this Court that the defendants William J. Smodic and Theodore J. Geffert had the legal authority or power to discharge the plaintiff because the evidence shows that the legal authority or power to discharge the plaintiff was vested in the Crestwood School Board under the provisions of the Pennsylvania Public School Code of 1949 (§1127).*

12. In addition to the foregoing reasons, Defendants offer

the following reasons in support of the Motion for Judgment n.o.v.

A. The Honorable Court erred in denying the defendants pre-trial motions to dismiss and/or for summary judgment on the ground that the plaintiff's cause of action was barred by the statute of limitations. The defendants do continue to assert that the action was barred by a six month statute of limitations.

B. The Honorable Court erred in denying the defendants said pre-trial motions on the bases of collateral estoppel and/or res judicata. Since the plaintiff's dismissal was litigated under the State procedures and the plaintiff had recourse in the courts of the Commonwealth of Pennsylvania and did, in fact, exercise said recourse, the defendants do continue to assert that the decision of the Board of Education, the findings of fact reached by the Secretary of Education and, finally, the decision of the Commonwealth Court of Pennsylvania affirming the findings of the Secretary of Education had collateral estoppel and/or res judicata effect as to these issues and factual determinations and should have been granted that effect.

C. The plaintiff's cause of action was litigated and adversely decided against her in the Commonwealth Court of Pennsylvania and she failed to appeal to the Supreme Court of the Commonwealth of Pennsylvania even though she had the opportunity to do so.

D. The plaintiff had the opportunity and did, in fact, litigate all issues in her State Court proceeding. She did not challenge the sufficiency of the evidence at that time

and neither did she challenge the findings of the Secretary of Education. She had the opportunity to present any constitutional argument she would wish to present and did not raise the issues of free speech or sexual harassment at that time although she did raise other constitutional (double jeopardy) arguments. The Commonwealth Court which had the jurisdiction and opportunity to consider all constitutional issues which the plaintiff had to present found neither a violation of constitutional rights, an abuse of discretion, an error of law, or a finding of fact unsupported by substantial evidence. A copy of the Commonwealth Court Decision which found no infirmity which warranted the disturbing of the Order of the Secretary of Education is attached hereto and incorporated by reference. This Opinion was previously referred to by the defendants in prior motions.

E. The plaintiff had the opportunity to fully litigate her constitutional arguments in State Court and failed to do so. This Honorable Court should have precluded the raising of these issues in the instant case. All free speech use which the plaintiff had could have been raised in the State Court proceedings and therefore should be considered as claim and issue precluded in this action. *Migra v. Warren City School District Board of Education,* 79 L. Ed. 2d 56 (1984).

F. Judgment n.o.v. should also be granted because the uncontradicted testimony of the defendants witnesses at trial showed that the plaintiff was discharged from her teaching job not for a violation of any protected Federal right such as free speech but for numerous other professional violations and that the Crestwood School

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District specifically decided that the plaintiff was not terminated for any free speech exercised but rather for other reasons which were set forth in the resolution of the Board. There was no testimony contradicting that decision.

G. The plaintiff did not allege in her complaint and never filed an amended complaint to claim sexual harassment as a cause of action although testimony about such alleged harassment permeated the trial.

H. That any claim of sexual harassment was barred by the statute of limitations of six months and by the statute of limitations of six years applied by this Honorable Court insofar as the last alleged harassment occurred in October of 1977 and the first knowledge of same was asserted by the plaintiff in a deposition on November 22, 1983.

I. The plaintiff withdrew and/or dismissed her case against the School Board and therefore the case should have proceeded and tried only against the defendants Smodic and Geffert and the Crestwood School District should not have been a party thereto.

J. Judgment n.o.v. should be granted because the Court erred in finding as a matter of law that the plaintiff's letter to the Western Pocono Press was protected first amendment speech as a matter of law and that, rather, read as a whole and in its entirety said document was not protected free speech.

K. Judgment n.o.v. should be granted because there

was no evidence before the Honorable Court or to allow the jury to reach a decision that the plaintiff was dismissed because of the exercise of her first amendment rights or that said exercise was a substantial or motivating cause of her dismissal.

WHEREFORE, Defendants do pray that judgment be entered in their favor and against the Plaintiff notwithstanding the verdict entered by the jury in this case.

MOTION FOR NEW TRIAL

Defendants, by and through their counsel, do respectfully move this Honorable Court for a new trial and assign the following reasons therefor:

13. Defendants do incorporate paragraphs 1 through 8 in their entirety as if fully set forth herein.

14. Defendants do assign the following errors which took place at the trial in the above matter.

a. The testimony of Frank Reatini and James Keiser was allowed into evidence over objection. This testimony, as indicated prior thereto with the offer of proof indicated that the witnesses performed acts which were neither of the quantity nor quality of those performed by the plaintiff. Their testimony was neither probative nor relevant and was prejudicial to the defendants case.

b. The aforementioned testimony of James Keiser and Frank Reatini was allowed notwithstanding the previous ruling by the Court which prohibited Mary Redgate from

testifying to her knowledge of individuals who performed some, but not all acts of insubordination and negligence which were performed by the plaintiff, which ruling, it is submitted, was correct and which should have precluded the same testimony by the witnesses Reatini and Keiser.

c. Testimony was allowed, over objection, to allege sexual misconduct of the defendant Theodore J. Geffert. This testimony should have been precluded by the statute of limitations and the inclusion of such testimony, which permeated the trial, served to prejudice the jury against the defendants, distracted the jury from the issue of free speech, serve to inflame the jury against the defendants, especially defendant Theodore J. Geffert, was of a self serving nature and was uncorroborated by any other testimony and served to deny the defendants a fair trial.

d. The Court erred in describing the plaintiff's letter to The Western Pocono Press as constituting an exercise of free speech as the letter was primarily concerned with matters of personal concern and, read as a whole would not constitute protected free speech.

e. The Court erred in allowing the testimony of William Barcheski. Witness Barcheski was not identified on the witness list for the plaintiff when the matter was scheduled to go to trial in January of 1984 and at subsequent dates and was only identified immediately prior to the trial beginning March 4, 1985. The defendants were therefore deprived of an opportunity to fully research the background of this individual. The testimony of this individual was also improperly admitted because this individual testified to the accuracy of the charges brought

in 1978 and, because of the passage of time, the defendant, particularly Theodore J. Geffert, were unable to testify accurately to the identity of the person who was actually involved in said charge.

f. The trial court erred in allowing Elizabeth Gobla to testify as to the accuracy of the charges against her as these charges were established as true through a proceeding fully litigated in the Pennsylvania State Courts.

g. The trial court erred in allowing Elizabeth Gobla to testify to her allegation that her dismissal was motivated by her exercise of free speech or by alleged sexual harassment by Theodore J. Geffert as these items were known to her at the time of her State Court proceedings and could have been raised at that time while she had raised other constitutional arguments.

14. In addition to the foregoing, the closing arguments by counsel for the plaintiff would require a new trial for the following reasons:

a. The plaintiff's counsel incorrectly and improperly argued that nothing had happened subsequent to the suspension of Elizabeth Gobla which would motivate her dismissal when, in fact, a large number of the charges resulted from incidents which took place subsequent to her being charged with failing to sign in which was the subject of the suspension action. This misleading and inaccurate argument was prejudicial to the defendants.

b. Plaintiff's counsel argued that the sign-in procedure had to be part of a collective bargaining

agreement to be enforceable. This was incorrect and misleading and therefore prejudicial to the defendants.

c. Counsel improperly utilized a scriptural passage to ridicule defendant Theodore J. Geffert. The said passage, which was quoted, referred to a scoundrel as one who "shuffled his feet" an apparent comment on the manner in which the defendant walks. The manner in which the defendant Geffert walks was not a subject of the proceedings and, had it been the subject of these proceedings, testimony would have been brought forth that defendant Geffert suffers from a severe arthritic condition which affects his walking.

d. Counsel argued improperly the failure of the defendants to call witnesses in their case in chief when said witnesses were fully available to the plaintiff's counsel and had, in fact, been listed as witnesses for the plaintiff on their various witness lists. The reference to the absence of testimony by Francis P. Burns, Peter O'Brien and John Delaney, which witnesses were available to the plaintiff by subpoena, was prejudicial to the defendants.

15. The Court incorrectly and improperly charged the jury that the School District was vicariously liable for the sexual harassment and other actions by the individual defendants. This was a misapplication of the law and was prejudicial to the defendants.

16. The Court erred in allowing cross examination of defendant Geffert and Smodic for impeachment purposes by frequent references to depositions, requests for admissions, affidavits, answers to interrogatories and other documents which

frequent referencing did not show any inconsistency in the witnesses testimony and which frequent referencing gave the illusion that may have created the belief in the jurors minds that the witnesses were testifying improperly, dishonestly or in some other fashion which would have required and allowed the frequent efforts of impeachment.

WHEREFORE, defendants do request a new trial in the case at bar.

s/ Joseph B. Farrell
JOSEPH B. FARRELL, Esquire

s/ Harry P. Mattern
HARRY P. MATTERN, Esquire
Attorneys for Defendants
1021 United Penn Bank Building
Wilkes-Barre, PA 18701
(717) 822-5643

APPENDIX G — DEFENDANTS' MOTION FOR DIRECTED VERDICT DATED MARCH 12, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 82-0699

ELIZABETH A. GOBLA,

PLAINTIFF

vs.

CRESTWOOD SCHOOL DISTRICT, et al.,

DEFENDANTS

TO THE HONORABLE CHIEF JUDGE WILLIAM J. NEALON OF SAID COURT:

The Defendants, CRESTWOOD SCHOOL DISTRICT, WILLIAM J. SMODIC and THEODORE J. GEFFERT, file this, their Motion for Directed Verdict, and in support thereof would show unto the Court the following:

I.

The Plaintiff, Elizabeth A. Gobla, filed this action alleging violation of 42 U.S.C. §1983, 1985, and the Pennsylvania Equal Rights Amendment pursuant to her discharge as a school teacher from the Crestwood School District. The Court, in a Memorandum and Order filed February 1, 1985 in response to Defendants' Motion for Summary Judgment, identified the three broad issues involved in this case as: (1) the First Amendment issue; (2) the

equal protection issue; and (3) the conspiracy issue.

With respect to the conspiracy issue, the Plaintiff, in order to make out a prima facie case, must show that the Defendants acted in concert to do something illegal and/or that they used illegal means to accomplish the Plaintiff's discharge. Before a plaintiff can establish a prima facie case of retaliation for exercising her First Amendment Rights, the plaintiff must show (1) that she engaged in protected activity, (2) that subsequently adverse action was taken against her, and (3) that there is a causal link between the employee's action and the employer's action. In order for a plaintiff to establish a prima facie case of sexual discrimination, plaintiff must at least show that she was receiving different treatment from that received by other individuals similarly situated. In order for the Plaintiff to establish a prima facie case of sexual harassment, the Plaintiff must prove that Defendant Geffert engaged in a long and pervasive course of conduct involving offensive sexual remarks directed to the Plaintiff.

II.

Defendants' Motion should be granted because, as a matter of law, there is no evidence to submit to the jury that the Plaintiff was discriminated against because of her sex or her exercise of her First Amendment rights, nor is there any evidence to be submitted to the jury of the existence of a conspiracy. The evidence in this case establishes that:

1. The Plaintiff wrote a letter to the School Board members which was published in a newspaper after she had been given a twenty (20) day suspension from duty by the School Board.

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2. The letter was mostly concerned with matters personal to the Plaintiff, although there were some comments of matters which could be considered public concerned, but that was only a small portion of a rather lengthy letter.

3. The Plaintiff was discharged because of numerous violations of rules and regulations of the School District which constitute insubordination.

4. The Plaintiff appealed her discharge to the Secretary of Education of the Commonwealth of Pennsylvania and ultimately to the Commonwealth Court of Pennsylvania. Both of these appellate bodies affirmed the decision of the School Board.

5. At no time during her employment as a teacher in the Crestwood School District did the Plaintiff complain to anyone about the alleged sexual harassment by Defendant Geffert.

6. The Plaintiff did not raise the issue of sexual harassment when she appealed her dismissal to the Secretary of Education or to the Commonwealth Court of Pennsylvania.

7. The Plaintiff did not mention the alleged sexual harassment to anyone including her husband and her sister.

8. There is no evidence of the existence of a conspiracy nor is there any evidence that the Defendants Smodic and Geffert in concert with Mary Redgate secured false witnesses or false testimony to be used in the

proceedings of termination against the Plaintiff, Elizabeth A. Gobla.

III.

In addition to the foregoing, this Court should also grant Defendants' Motion for Directed Verdict because:

1. There is no evidence before this Court or there is insufficient evidence before this Court to warrant a finding that the Defendants:

(a) Harassed or in any way discriminated against the Plaintiff because of her sex;

(b) Harassed the Plaintiff because she exercised her rights to free speech;

(c) Terminated the Plaintiff because of her sex;

(d) Terminated the Plaintiff because of the exercise of her First Amendment rights.

2. There is no evidence before this Court or there is insufficient evidence to warrant a finding that the alleged exercise of the Plaintiff's First Amendment rights involved protected speech, because most of the content of the letter to the Board Members involved matters of Plaintiff's personal concern rather than public concern.

3. There is no evidence before this Court or there is insufficient evidence before this Court to warrant a finding that the Plaintiff was sexually harassed by Theodore J. Geffert.

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4. There is no evidence before this Court or there is insufficient evidence before this Court to warrant a finding that there is any causal link between Plaintiff's discharge and her exercise of her right to free speech.

5. There is no evidence before this Court of there is insufficient evidence before this Court to warrant the finding that sexual harassment played any role in any of the actions taken by the Defendants in this case.

6. There is no evidence before this Court that the Defendants William J. Smodic and Theodore J. Geffert had the legal authority to discharge the Plaintiff.

7. There is no evidence before this Court or there is insufficient evidence before this Court that the Defendant Theodore J. Geffert attempted to solicit sexual favors from the Plaintiff nor is there any evidence before this Court to indicate that the Defendant Theodore J. Geffert, ever attempted to touch the Plaintiff's body.

8. The evidence before this Court requires a finding as a matter of law:

(a) That sexual harassment played no part in the termination of the Plaintiff.

(b) That the exercise of her First Amendment rights played no part in the termination of the Plaintiff.

(c) That sexual discrimination played no part in the termination of the Plaintiff.

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9. The evidence before this Court requires a finding, as a matter of law, that no link of any kind has been shown to exist between the exercise of First Amendment rights by the Plaintiff and her discharge.

10. The evidence before this Court requires a finding, as a matter of law, that the Plaintiff has filed to make a prima facie case of sexual harassment, sexual discrimination, conspiracy and violation of First Amendment rights.

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IV.

CONCLUSION

WHEREFORE, the Defendants pray that this Court grant Defendants' Motion for Directed Verdict, discharge the jury and direct a verdict for the Defendants, that the Plaintiff take nothing from this suit, that it be dismissed with prejudice, that all costs of Court including Defendants' counsel fees be taxed against the Plaintiff, and for such other and further relief at law or in equity to which these Defendants are justly entitled.

Respectfully submitted,

By: Joseph B. Farrell
JOSEPH B. FARRELL, ESQUIRE

By: Harry P. Mattern
HARRY P. MATTERN, ESQUIRE
Attorneys for Defendants
The Crestwood School District,
William J. Smodic and
Theodore J. Geffert

1021 United Penn Bank Building
Wilkes-Barre, PA 18701-1875
(717) 826-1115

APPENDIX H — DEFENDANTS' ANSWER TO COMPLAINT DATED OCTOBER 12, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-82 0699

ELIZABETH A. GOBLA,

Plaintiff

vs.

CRESTWOOD SCHOOL DISTRICT and WILLIAM SMODIC, THEODORE J. GEFFERT, ESTHER WHEELER, LOUISE PHIPPS, JUDY JASTREMSKI, JOHN WILLIAMS, WILLIAM RAWLS, HAROLD RICHARDS, ERIC AIGELDINGER, CHARLES SIEMINSKI, and GEORGE BAAB, Individually and as Members of the the CRESTWOOD SCHOOL BOARD,

Defendants

ANSWER

The Defendants, CRESTWOOD SCHOOL DISTRICT and WILLIAM SMODIC, THEODORE J. GEFFERT, ESTHER WHEELER, LOUISE PHIPPS, JUDY JASTREMSKI, JOHN WILLIAMS, WILLIAM RAWLS, HAROLD RICHARDS, ERIC AIGELDINGER, CHARLES SIEMINSKI and GEORGE BAAB Individually and as members of the CRESTWOOD SCHOOL, by and through their attorneys, JOSEPH B. FARRELL and HARRY P. MATTERN, answer the COMPLAINT of the Plaintiff as follows:

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1. Admitted.

2. Admitted.

3. Admitted.

4. Admitted.

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted.

13. Admitted.

14. Admitted.

15. Admitted.

16. Defendants are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 16 of Plaintiff's COMPLAINT and proof thereof is

demanded at the trial of this matter.

17. The defendants deny that the plaintiff was considered by the defendants to be an opinion leader within the Crestwood Educational Association, the Union representing the teachers in the Crestwood School District and defendants are without knowledge or information to form a belief as to the averment in paragraph 17 that plaintiff was, in fact, an opinion leader within the Crestwood Educational Association, the union representing the teachers in the Crestwood School District and proof thereof is demanded at the trial of this matter.

18. The defendants deny that the plaintiff was arbitrarily, capriciously, and without cause suspended by the defendants on March 4, 1978, as a result of the exercise of her constitutional rights. The defendants admit that the plaintiff was suspended by the defendants on March 4, 1978, but aver that plaintiff's suspension was with good cause and further state that plaintiff was accorded due process with regard to her suspension. Defendants admit that plaintiff was terminated from her position as a tenured faculty member of the Crestwood School District but further aver that her termination resulted from misconduct on the part of the plaintiff and that her termination was in accordance with the provisions of the Pennsylvania Public School Code of 1949, as amended.

19. Defendants admit that the initial suspension of the plaintiff by defendants occurred on March 4, 1978, and tht defendants aver that plaintiff was terminated by defendants on November 2, 1978.

20. In answer to paragraph 20 of plaintiff' s COMPLAINT, defendants aver that the suspension and termination of the plaintiff

were not as a result of the instigation of the individual defendants acting in concert among themselves and with others, but that the suspension and termination of the plaintiff were done in accordance with the provisions of the Pennsylvania Public School Code of 1949, as amended.

21. Defendants deny that the plaintiff's suspension and termination were the result of acts by the defendants taken in bad faith and defendants further deny that the grounds asserted against the plaintiff by individual defendants were manufactured by the various defendants solely in an effort to silence plaintiff. In further answer to paragraph 21 of the plaintiff's COMPLAINT, the defendants aver that plaintiff's suspension and termination were the result of misconduct on the part of the defendant and her suspension and termination were effected in accordance with the provisions of the Pennsylvania Public School Code of 1949, as amended.

22. The defendants deny that defendants set out upon a plan or scheme to discredit plaintiff and secure her removal from her tenured teaching position. Defendants further aver that plaintiff's removal from her tenured teaching position was the result of misconduct on the part of the defendant.

23. The defendants deny that defendants planned or schemed to file false charges, secure false statements from alleged witnesses and the defendants further deny that there was any harassment of the plaintiff or any denial of plaintiff's due process rights. Defendants further answer that the charges filed against the plaintiff were true and there were no false statements from alleged witnesses. Defendants further deny that there was any harassment of plaintiff or any denial of plaintiff's due process rights and defendants further aver that plaintiff was at all times accorded

due process rights as provided by the Pennsylvania Code of 1949, as amended, and the Constitution of the United States.

24. Defendants deny that a plan or a scheme to file false charges, secure false statements from alleged witnesses, to harass the plaintiff and to deny plaintiff's due process rights existed among the defendants and therefore there were no participants in the alleged plan or scheme who could divulge the existence of the alleged plan or scheme on February 13, 1982, or at any other time. Defendants further aver that any claim of an alleged plan or scheme to file false charges, etc., is without foundation in fact and said allegation is false.

25. The defendants deny that they participated in any acts against the plaintiff that were careless, reckless and negligent. Defendants further aver that all acts taken against the plaintiff with regard to her suspension and termination were taken in good faith and in accordance with the provisions of the Pennsylvania Public School Code of 1949, as amended. Defendants further aver that plaintiff was accorded her due process rights according to laws of Pennsylvania and the Constitution of the United States.

26. It is denied that the defendants knowingly and maliciously conspired to remove plaintiff from her tenured faculty position in violation of plaintiff's constitutional rights and do further aver that all actions by the defendants were in compliance with applicable state and federal laws and the Constitution of the United States.

27. It is denied that the defendants engaged in any acts that were in violation of the existing written agreement between the Crestwood School District and the Crestwood Educational Association and plaintiff and do aver compliance with said agreement.

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28. It is denied that the defendants engaged in any illegal and unconstitutional activities against the plaintiff. The defendants have no knowlege of severe financial loss, emotional harm or embarrassment as proof of these alleged damages is within the control and knowledge of the plaintiff and said averment is therefore denied. Strict proof therefore is demanded for trial. Defendants do further aver that if plaintiff has suffered said damages, that any such harm is the result of the misconduct and actions of the plaintiff.

WHEREFORE, defendants respectfully request this Honorable Court to dismiss the plaintiff's COMPLAINT and enter judgment in favor of the defendants.

Respectfully submitted,

s/ Joseph B. Farrell
JOSEPH B. FARRELL,
ESQUIRE

s/ Harry P. Mattern
HARRY P. MATTERN,
ESQUIRE
Attorneys for Defendants

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COMMONWEALTH OF PENNSYLVANIA :
:
COUNTY OF LUZERNE :

I, THEODORE J. GEFFERT, one of the Defendants named in the COMPLAINT, being duly sworn according to law, depose and say that the facts set forth in the foregoing ANSWER are true and correct to the best of my knowledge, information and belief.

s/ Theodore J. Geffert
THEODORE J. GEFFERT

Sworn to and subscribed before me this 13th day of October, 1983.

s/ Catherine Sudo
NOTARY PUBLIC

(STAMPED)

APPENDIX I — INDIVIDUAL DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT DATED JULY 6, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. CV-82 0699

ELIZABETH A. GOBLA,

Plaintiff,

CRESTWOOD SCHOOL DISTRICT and WILLIAM SMODIC, THEODORE J. GEFFERT, ESTHER WHEELER, LOUISE PHIPPS, JUDY JASTREMSKI, JOHN WILLIAMS, WILLIAM RAWLS, HAROLD RICHARDS, ERIC AIGELDINGER, CHARLES SIEMINSKI, and GEORGE BAAB, Individually and as Members of the CRESTWOOD SCHOOL BOARD,

Defendants

The Defendants, WILLIAM SMODIC, THEODORE J. GEFFERT, ESTHER WHEELER, LOUISE PHIPPS, JUDY JASTREMSKI, JOHN WILLIAMS, WILLIAM RAWLS, HAROLD RICHARDS, ERIC AIGELDINGER, CHARLES SIEMINSKI, and GEORGE BAAB, by and through their Counsel, JOSEPH B. FARRELL, respectfully move this Honorable Court as follows:

1. To dismiss the action against the Defendants named above based on *42 U.S.C. § 1983 and § 1985 and* upon the Pennsylvania Equal Rights Amendment because the action is barred by the Pennsylvania Statute of Limitations set forth in *42 Pa. Cons. Stat. Ann. § 5522(b)(1)* which provides:

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(b) Commencement of action required—The following actions and proceedings must be commenced within six months:

(1) An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

This section is applicable because the Defendants above named were officers of the Crestwood School District and the action against them is based upon things done in the execution of their office.

JOSEPH B. FARRELL
Attorney for Defendants

APPENDIX J — STATUTORY PROVISIONS

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

> (1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure

his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict presentment or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of

depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived in having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

R.S. § 1980.

42 Pa. Cons. Stat. Ann. § 5524 (Purdon 1981) Two year limitation

The following actions and proceedings must

be commenced within two years:

(1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for a civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer of any government unit for the nonpayment of money or the nondelivery of property collected upon or execution or otherwise in his possession.

1976, July 9, P.L. 586, No. 142, § 2, effective June 27, 1978.

42 Pa. Cons. Stat. Ann. § 5527 (Purdon 1981) Six year limitation

The following actions and proceedings must

be commenced within six years:

(1) An action upon a judgment or decree of any court of the United States or of any state.

(2) An action upon a contract, obligation or liability founded upon a bond, note or other instrument in writing, except an action subject to another limitation specified in this subchapter. *Where an instrument is payable upon demand, the time within which an action or proceeding on it must be commenced shall be computed from the later of either demand or any payment of principal or of interest on the instrument.*

(3) An action upon any official bond.

(4) A proceeding in inverse condemnation, if property has been injured but no part thereof has been taken, or if the condemnor has made payment in accordance with section 407(a) or (b) (relating to possession and payment of compensation) of the act of June 22, 1964 (Sp. Sess., P.L. 84, No. 6), known as the "Eminent Domain Code."[1]

(5) An action to set aside a judicial sale of property.

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1. This 1980 amendment added the second sentence to par. (2).

(6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

1976, July 9, P.L. 586, No. 142 § 2, effective June 27, 1978. As amended 1980, Dec. 5, P.L. 1104, No. 189, § 5, imd. effective.

This act shall take effect immediately and the amendments to 42 Pa.C.S. §§ 761(a)(1)(iv), 933(a)(1)(v), 5527(2) (as to instruments under seal) and 5529 effected by this act shall be retroactive to June 27, 1978.

Section 7 of the Act 1980, Dec. 5, P.L. 1104, No. 189.

42 Pa. Cons. Stat. Ann. § 5524 (Purdon Supp. 1985) Two year limitation

The following actions and proceedings must be commenced within two years:

(1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.

(2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(3) An action for taking, detaining or

injuring personal property, including actions for specific recovery thereof.

(4) An action for waste or trespass of real property.

(5) An action upon a statute for a civil penalty or forfeiture.

(6) An action against any officer of any government unit for nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession.

(7) *Any other action or proceeding to recover damages for injury to person or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass, including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter.*

As amended 1982, Dec. 20, P.L. 1409, No. 326, art. II, § 201, effective in 60 days.

* * *

Applicability of amendments.—Except as provided in section 404, the amendments to 42 Pa. C.S. Ch. 55 (relating to limitation of time) effected by this act shall apply only to causes of action which accrue after the effective date of this act.

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Act 1982, Dec. 20, P.L. 1409, No. 326, § 403

42 Pa. Cons. Stat. Ann. § 5527 (Purdon Supp. 1985) Six year limitation

> Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation) must be commenced within six years.

As amended 1982, Dec. 20, P.L. 1409, No. 326, art. II, § 201, effective in 60 days.

42 Pa. Cons. Stat. Ann. § 5522. Six months limitation

> (a) Notice prerequisite to action against government unit.—
>
> > (1) Within six months from the date that any injury was sustained or any cause of action accrued, any person who is about to commence any civil action or proceeding within this Commonwealth or elsewhere against a government unit for damages on account of any injury to his person or property under Chapter 85 (relating to matters affecting government units) or otherwise shall file in the office of the government unit, and if the action is against a Commonwealth agency for damages, then also file in the office of the Attorney General, a statement in writing, signed by or in his behalf, setting forth:

Appendix J

(i) The name and residence address of the person to whom the cause of action has accrued.

(ii) The name and residence address of the person injured.

(iii) The date and hour of the accident.

(iv) The approximate location where the accident occurred.

(v) The name and residence or office address of any attending physician.

(2) If the statement provided for by this subsection is not filed, any civil action or proceeding commenced against the government unit more than six months after the date of injury shall be dismissed and the person to whom any such cause of action accrued for any personal injury shall be forever barred from proceeding further thereon within this Commonwealth or elsewhere. The court shall excuse noncompliance with this requirement upon a showing of reasonable excuse for failure to file such statement.

(3) In the case of a civil action or proceeding against a government unit other

than the Commonwealth government:

(i) The time for giving such written notice does not include the time during which an individual injured is unable, due to incapacitation or disability from the injury, to give notice, not exceeding 90 days of incapacity.

(ii) If the injuries to an individual result in death, the time for giving notice shall commence with such death.

(iii) Failure to comply with this subsection shall not be a bar if the government unit had actual or constructive notice of the incident or condition giving rise to the claim of a person.

(b) Commencement of action required.—The following actions and proceedings must be commenced within six months:

(1) An action against any officer of any government unit for anything done in the execution of his office, except an action subject to another limitation specified in this subchapter.

(2) A petition for the establishment of a deficiency judgment following sale of the collateral of the debtor under the provisions

of section 8103 (relating to deficiency judgments).

(3) Any action subject to 13 Pa. C.S. § 6111 (relating to limitation of actions and levies).

(4) An action under section 4563.1(c) (relating to civil liability).

1980, Oct. 5, P.L. 693, No. 142, § 221(i)(1), effective in 60 days.

No. 86-1432

In the Supreme Court of the United States

October Term, 1986

ELIZABETH A. GOBLA,
Petitioner

vs.

CRESTWOOD SCHOOL DISTRICT, WILLIAM SMODIC and THEODORE J. GEFFERT,
Respondents

RESPONDENT'S BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

FARRELL, FRANK & MATTERN
JOSEPH B. FARRELL
HARRY P. MATTERN
Attorneys for Respondents

1021 United Penn Bank Building
Wilkes-Barre, PA 18701
(717) 822-5643

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

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STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions noted by Petitioner, the Respondents reference the *Pennsylvania Public School Code of 1949 as amended, 24 P.S. §11-1127*. The foregoing statute is reproduced as APPENDIX A.

COUNTERSTATEMENT OF THE CASE

Mindful of the mandate to be as brief as possible, Respondents nevertheless are constrained to restate the case to correct regrettable inaccuracies and omissions in the rendition related in the Petitioner's Brief.

The Petitioner, Elizabeth Gobla, became a tenured teacher in the Crestwood School District in May, 1973, and she was afforded all the rights and privileges provided in the Pennsylvania Public School Code of 1949 as amended, including discipline procedures as set forth in 24 P.S. §11-1127.

In February, 1978, the Petitioner was notified by the School District that a hearing was being scheduled to consider charges of insubordination against her due to her failure to follow the sign-in procedure for four consecutive days. The Petitioner responded to this notice by affixing her signature to the sign-in sheet in an Oriental language on the day of the hearing and she also circulated a mimeographed flyer bearing the words "WHAT, ME WORRY?" together with a cartoon character from *Mad* Magazine named Alfred E. Newman. The flyer ridiculed the upcoming disciplinary hearing and called for a gathering of her sympathizers at a local bar after that hearing. As a result of the March 1978 disciplinary hearing, the Petitioner was suspended without pay for twenty (20) days, commencing March 13, 1978. However, on March 10, 1978, she sustained a work-related injury and collected Workmen's Compensation for the rest of that school year.

See *Gobla v. Crestwood School District*, 51 Pa. Commonwealth Ct. 539, 414 A.2d 772, 773 (1980).

In the course of her medical absence, she ignored requests to return her lesson plan book, grade book, and school keys. She also failed to respond to requests for information concerning her availability for work in the upcoming 1978-1979 school year and she ignored requests for medical information to substantiate the basis for her Workmen's Compensation claim.

As a result of her defiant conduct during the balance of the school term from which she was absent, she was notified on September 5, 1978, that a hearing was being scheduled to consider thirty-five (35) specific charges of insubordination and violations of school laws. Two hearings were held at which the Petitioner was represented by Counsel and at the conclusion of the hearings, the Petitioner was notified that she was dismissed from her employment as teacher on November 1, 1978. The Petitioner exercised her rights of appeal to the Secretary of Education who upheld the decision of the School Board and she subsequently appealed to the Commonwealth Court of Pennsylvania which also upheld her dismissal. The Commonwealth Court, in the case of *Gobla v. Crestwood School District*, 51 Pa. Commonwealth Ct. 539, 544, 414 A.2d 772 (1980) stated on page 774:

> "This Court must affirm the order of the Secretary unless there was a violation of constitutional rights, an abuse of discretion, an error of law, or if a necessary finding of fact is unsupported by substantial evidence. (Citations omitted.) We find no infirmity which warrants our disturbing the order of the Secretary of Education in this case, and we affirm."

Counterstatement of the Case

The Petitioner did not exercise her right of appeal to the Pennsylvania Supreme Court and, therefore, the decision of the Commonwealth Court became final.[1]

On September 5, 1978, the day on which Petitioner was notified that she was being suspended pending a termination hearing, an attorney sent a letter on her behalf to the School District stating, in part, "Please consider this letter notice to the School District for the institution of a lawsuit for the damages pursuant to section 1983 of the Federal Civil Rights Act." Petitioner did not institute her claim for damages under section 1983 until June 4, 1982.

The Petitioner filed her Complaint against the Crestwood School District, William Smodic, Theodore J. Geffert, and the nine School Board members alleging, inter alia, that the Defendants had filed false charges, se-

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[1] In a Motion to Dismiss, the Defendants urged the District Court to invoke the Doctrine of Collateral Estoppel or Res Judicata since the Claimant had already litigated her constitutional rights through the Pennsylvania Court System. "The fundamental rule is that a prior judgment on the merits is conclusive not only as to those issues actually raised but as to those also which might have been raised but were omitted." *Husted v. Canton Area School District et al.*, 73 Pa. Commonwealth Ct. 380, 458 A.2d 1037, 1039 (1983). The Plaintiff escaped the invocation of this Fundamental Rule at that early stage of the instant litigation based on her claim that she did not know of the alleged constitutional violations until Mary Redgate disclosed them to her in 1981. The Defendants reasserted the Doctrine of Collateral Estoppel in their Motion for Directed Verdict and Motion N.O.V. insofar as a thorough review of Mary Redgate's testimony at trial reveals that she did not, in fact, offer anything relating to any alleged First Amendment Offenses. The Trial Court also recognized this failing and instructed the jury during the trial that Mary Redgate did not, in fact, offer any testimony substantiating the plaintiff's First Amendment argument. The Respondents assert that *Migra v. Warren City School District*, 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed. 2d 56 (1984) should have been applied.

cured false statements from alleged witnesses, and denied the Plaintiff's Due Process Rights. These allegations were made in spite of the fact that Petitioner had three (3) previous hearings and the Commonwealth Court held that the evidence submitted by the School administrators was sufficient to sustain the charges against the Petitioner and the Commonwealth Court also commented that the Petitioner did not contest the sufficiency of the evidence. *Gobla v. Crestwood School District*, 51 Pa. Commonwealth Ct. 539, 414 A.2d 772, 773 (1980). It should be noted that the Petitioner voluntarily dismissed the nine (9) School Board members as Defendants in this case on May 4, 1984 even though the legal authority to dismiss a professional employee from employment with the School District is lodged in the Board of Directors of the School District 24 P.S. §11-1127. (See Appendix A, p. 1a.)

The Defendants responded to Plaintiff's complaint by presenting a Motion to Dismiss because the Complaint was not timely filed. At the time the Defendants asserted the defense of the Statute of Limitations, there were several decisions by District Courts indicating that a six (6) months' residuary limit established by 42 Pa. C.S.A. 5522(b)(1) was the applicable Statute of Limitations for Claims Against Public Officials. *Clyde v. Thornburg*, 533 F. Supp. 279 (EDPA 1982); *Kelly v. City of Philadelphia*, 552 F. Supp. 574, 577 (EDPA 1982). It was not until January 27, 1983 that the Third Circuit Court of Appeals in the case of *Knoll v. Springfield Twp. School District*, 699 F.2d 137 held that the appropriate Statute of Limitations was a residual statute of six (6) years. The decision in that case was rendered more than six (6) months subsequent to the time that the Petitioner filed her Suit in June of 1982. She could not have relied on that holding in ascertaining the

correct Statute of Limitations to apply to her proposed action.

The District Court in this case correctly concluded that since the Defendants raised the Statute of Limitations as the defense immediately, they are free to reassert that defense in light of the fact the precedent the District Court relied upon has been vacated. *Gobla v. Crestwood School District et al.*, 628 F. Supp. 43 (M.D. PA 1985).

This case presents neither a factual nor a legal basis sufficient to merit a granting of a Writ of Certiorari to the Third Circuit Court of Appeals.

REASONS FOR REFUSING TO GRANT THE WRIT OF CERTIORARI

I.

This Court Has Determined the Scope of the Retroactive Application of *Wilson v. Garcia,* 105 S.Ct. 1938 (1985)

In the case of *Wilson v. Garcia,* supra, this Court held that the New Mexico statute which provided a three-year limitations period for personal injury actions applied to a claim filed under 42 U.S.C. Section 1983 and in so holding, this Court effectively overruled the New Mexico Supreme Court's consistent application of a two-year Statute of Limitations. In *DelCostello v. Teamsters,* 462 U.S. 151 (1983), this Court declined to apply a state Statute of Limitations when the Court was convinced that a Federal Statute of Limitations for another cause of action better reflected the balance that Congress would have preferred between the substantive policies underlying the Federal claim and the policies of repose. In effect, this Court was retroactively applying a Statute of Limitations because it believed that the Federal statute better served the purposes underlying the Federal claim.

The Petitioner has stated at Page 10 of her Petition "the fact is that Mrs. Gobla would be returned to her tenured faculty position in the Crestwood School District if she resided within the United States Court of Appeals for the Sixth Circuit, the Seventh Circuit, the Ninth Circuit

or the Tenth Circuit." The Petitioner has cited in the footnotes the cases of *Carroll v. Wilkerson*, 782 F.2d 44 (6th Cir. 1986), *Anton v. Lehpamer*, 787 F.2d 1141 (7th Cir. 1986), *Gibson v. United States*, 781 F.2d 1334 (9th Cir. 1986), and *Jackson v. City of Bloomfield*, 731 F.2d 652 (10th Cir. 1984) in support of this statement. A reading of these cases clearly shows that the cases do not stand for the proposition asserted by the Petitioner. In the case of *Carroll v. Wilkerson*, supra, the U. S. Court of Appeals, 6th Circuit, applied this Court's holding in *Wilson v. Garcia* retroactively and the Court in that case noted that it was following its holding in *Mulligan v. Hazard*, 777 F.2d 340 (1986) petition for rehearing denied August 19, 1986. U.S. , 92 L.Ed. 2d 767, 107 S.Ct. 12. In *Anton v. Lehpamer*, supra, the Court of Appeals for the 7th Circuit did not apply *Wilson v. Garcia*, supra, retroactively for the stated reason that at the time the plaintiff filed his Suit, the Federal Courts in Illinois applied a five-year statute in all Section 1983 actions.

In the case of *Gibson v. United States*, supra, the 9th Circuit Court of Appeals did not apply *Wilson v. Garcia* retroactively and gave the following reasons for its holding: "Before *Wilson*, this Circuit had long held that the California three-year Statute of Limitations for actions "upon a liability created by statute", ... governed all Section 1983 claims brought in California." Supra, page 1339. It further stated "the final Chevron factor weighs dispositively against retroactive application, for it would yield ' "substantial inequitable results" to hold that the Respondent "slept on his rights" at a time when he could not have known the time limitation that the Law imposed upon him.' " Supra, page 1339.

In *Rivera v. Green,* 775 F.2d 1381 (9th Cir. 1985), the Court granted Wilson retroactive application when it had the effect of lengthening rather than abbreviating the limitation.

In *Jackson v. the City of Bloomfield,* supra, at page 655, the 10th Circuit did not apply *Wilson v. Garcia* retroactively stating:

> "At the time this Suit was filed, Hansbury v. The Regents of the University of California, 596 F.2d 944, was clear authority that the New Mexico four-year limitations period governed claims of unconstitutional employment discrimination under section 1983. Shah was also clear authority that the longer of the two arguably applicable limitations statutes would be applied. ... Plaintiffs justifiably relied on those cases in concluding that their suit was timely."

In the case at Bar, there was no clear authority upon which the Petitioner could have relied. *Fitzgerald v. Larson,* 769 F.2d 160, *Smith v. the City of Pittsburgh,* 764 F.2d 118 (3rd Circuit 1985), Cert. Denied (106 S.Ct. 349) 1985. In the case of *Fitzgerald v. Larson,* supra, at page 164, the 3rd Circuit Court of Appeals stated that:

> "We thus conclude, as we did in Smith v. City of Pittsburgh, that the law was not sufficiently clear to have made it reasonable for a plaintiff to have delayed filing suit for more than two years after May 1979 in the expectation that a six-year limitation period would apply to a claim of wrongful discharge in violation of the First Amendment. The Supreme Court's decision in Wilson v. Garcia did not have the effect, in this situation, of overruling 'clear past precedent on which

litigants *may have relied*.' Chevron, 404 U.S. at 106, 92 S.Ct. at 365 (emphasis added)."

In conclusion, Respondents contend that the instant case is not a proper case for granting a Writ of Certiorari.

II.

This Case Does Not Present a Factual Vehicle To Determine the Application of State "Discovery Rules" to Actions Under Section 1983

Plaintiff clearly did not file her action within two years of her dismissal and therefore she now urges upon this Court, as she did upon the lower Courts, that a conspiracy existed to keep certain information from her. She asserts that the Pennsylvania "Discovery Rule" should be applied to the facts of this case. She claimed that she did not discover that she was fired for outspokenness and in retaliation for her exercise of First Amendment rights until February 13, 1981, when she maintains it was disclosed to her by Mary Redgate upon the occasion of Mary Redgate's dismissal from the Crestwood School District for immorality.

The facts do not support her contention.

As it was noted by the District Court,

"A careful review of Redgate's trial testimony, however, reveals that Redgate offered no support to plaintiff's theory that she was fired for exercising her right to free speech, *viz.* speaking out on kick-backs

> of school rings or writing to the newspaper criticizing the School Board. Rather, Redgate's testimony did not even address these issues and was directed principally to her part in collecting harmful data on plaintiff's teaching activities which ultimately were utilized by the School Board to support plaintiff's discharge." (*Gobla v. Crestwood School District et al.*, 628 F. Supp. 43, 47, (M.D. Pa. 1985))

The testimony of Mary Redgate disclosed that she had performed a classroom observation of Mrs. Gobla and that, following that observation and after her critique, Mrs. Gobla became abusive toward her. This incident, which Redgate testified occurred in December of 1977, was reported to Theodore Geffert and William Smodic and, according to her testimony, Dr. Smodic directed her at that time to observe the Plaintiff and document incidents of insubordination. Redgate did not, in fact, tie the directive to document incidents of insubordination to anything but the abusive conduct of the Plaintiff, Elizabeth Gobla, directed toward Mrs. Redgate (N.T. pages 215-218).

The fact that Mrs. Redgate did not offer anything having to do with the Plaintiff's First Amendment allegations was recognized and commented upon by Judge Nealon at Volume II, page 253 of the Transcript.

Even though Plaintiff's contention finds no basis in the facts and testimony was so minimal that the Court did not even submit the issue to the jury, Petitioner persists in relating this imagined favorable testimony as if it had indeed occurred. Plaintiff did not object at trial to the Court's not submitting the issue of conspiracy to the jury and is there-

fore precluded from asserting that the conspiracy claim is still viable. Fed. R.Civ.P. 49(a).[1]

Not only did Plaintiff's claim of conspiracy disappear at trial, but the Plaintiff's contention that she was unaware of any constitutional violation until 1981 was also refuted.

In further support of the inexcusable nature of the delay by the Plaintiff, reference is made to a letter from Elizabeth Gobla's counsel, John P. Moses, to Joseph B. Farrell, Solicitor for the Crestwood School District, dated September 5, 1978, placing the District on notice of the Plaintiff's intention to file a lawsuit for money damages pursuant to section 1983 of the Federal Civil Rights Act.[2] It is readily apparent that the Plaintiff intended to file a Civil Rights action as long ago as the date when she received the specification of charges by the School Board against her. Inexplicably, she refrained from filing her suit until June 4, 1982.

Plaintiff has cited a number of cases in her Brief on the application of the "Discovery Rule" which are not analogous to the instant case at all. One case, *Lewey, Appellant v. Fricke Coke Co.*, 166 Pa. 536, 31 Atlantic 261 (1895) refers to a situation wherein the defendant mined coal on property owned by the plaintiff by means of an underground approach which was not visible to the plaintiff. The other cases relate to medical problems arising from creeping asbestosis and other similar medical difficulties. They

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[1] Since the Plaintiff did not request the issue of conspiracy or discovery be submitted to the jury, the Court is thereupon empowered to make its own findings on these issues. Having considered all of the evidence, Judge Nealon has found that there was insufficient evidence to support the allegation of conspiracy. Furthermore, he has found that Mary Redgate did not disclose any evidence upon which the Plaintiff can assert her discovery claim.

[2] This letter is reproduced at Third Circuit JA. 543(a).

are inapplicable to the case at bar. Since Mary Redgate revealed nothing in her testimony having any nexus to the alleged First Amendment violations, nothing was "discovered" from her and the Discovery Rule should not be applied.

This case simply does not contain facts upon which to consider the question urged by the Petitioner.

III.

This Court Need Not Determine Whether or Not Civil Rights Defendants and Trial Courts Can Assert Affirmative Defenses Post-Verdict Which Were Neither Pleaded Nor Raised Prior to Verdict Since the Facts Do Not Support This Consideration

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The Petitioner has sought to fashion an issue of general importance from an alleged pleading deficiency which is patently illusory. The Defendants did plead the Statute of Limitations and did so immediately in the form of a Motion to Dismiss which was converted to a Motion for Summary Judgment by the Court. At the time that the Defendants asserted the defense of the Statute of Limitations, there were several decisions by United States District Courts in Pennsylvania indicating that a six-month limit established by 42 Pa. C.S.A. Section 5522(b)(1) was an applicable Statute of Limitations for claims against public officials. *Clyde v. Thornburg*, 533 F. Supp. 279 (EDPA 1982); *Kelly v. City of Philadelphia*, 552 F. Supp. 574 (EDPA 1982). It was not until January 27, 1983 that the Third Circuit Court of Appeals in the case of *Knoll v.*

Springfield Twp. School District, 699 F.2d 137, held that the appropriate Statute of Limitations was a residual statute of six years, and this decision formed the basis of the District Court's denial of the Defendant's Motion to Dismiss.

The Defendants raised the Statute of Limitations defense on three separate occasions. It had been raised in Defendants' Motion to Dismiss filed July 6, 1982, at a pre-trial conference with Judge Nealon and opposing counsel on February 28, 1985 prior to trial and in the context of Motion and Affidavit filed with the Court by Joseph B. Farrell on March 4, 1985. Through the efforts of defense counsel, the progress of the *Knoll v. Springfield Twp.* case had been monitored, and opposing counsel and the Court had been apprised of the argument date before the Supreme Court and discussion was had with the Court and counsel as to the effect this Honorable Court's determination could have on the case at bar. Nevertheless, the District Court proceeded to trial with this case notwithstanding the pendency of this important issue.

The Honorable William J. Nealon, Chief Judge of the Middle District of Pennsylvania, who authored the decision applying *Wilson v. Garcia* and *Knoll v. Springfield* to the case at bar had the benefit of knowing firsthand through his participation in the pre-trial conferences how strenuously the Defendants had pressed the Statute of Limitations issue. It is submitted that fair and just result was reached by Judge Nealon when it was determined that the case which had been tried and submitted to the jury (with the Plaintiff well aware that this Honorable Court's imminent decision in *Wilson v. Garcia* and *Knoll v. Springfield Twp.* could drastically affect the outcome) was,

indeed, a stale case and one which should have been dismissed by application of the applicable Statute of Limitations.[3]

The Plaintiff criticizes the lower Court for selecting the appropriate Statute of Limitations once that bar has been pleaded and characterizes this selection as "absurd." It should be noted that this Honorable Court did precisely this same thing in both *Wilson v. Garcia* and *Knoll v. Springfield Twp.* in determining *and applying* the appropriate limitation. The Petitioner plainly attempts to mislead this Court with the faulty impression that the Statute of Limitations defense was not timely pled or not pled until after the jury verdict. The District Court disposed of this argument stating:

> "The cases Plaintiff cites in support are inapposite in that those cases involved a situation in which the Defendant failed to plead the affirmative defense at all or failed to raise the defense until just before or during trial. See, e.g., Peterson v. Airline Pilots Assoc. Internat., 759 F.2d 1161 (4th Cir. 1985); Trio Process Corp. v. L. Goldstein's Sons, Inc., 461 F.2d 66 (3rd Cir. 1972); Evans v. Syracuse City School District, 704 F.2d 44 (2d Cir. 1984)."

As Judge Nealon stated further:

> "This Court does not interpret the analysis as restricting the Court to choose only the limitations period advanced by the parties. Rather, once the

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[3] The primary consideration underlying Statutes of Limitations is to expedite litigation and to preclude long delays which would be prejudicial to the person against whom the action is brought. *Insurance Company of North America v. Carnahan*, 446 Pa. 48, 284 A.2d 728 (1971); *Philadelphia, Appellant v. Litvin*, 211 Pa. Superior Ct. 204, 235 A.2d 157 (1967).

> issue of the Statute of Limitations period has been raised, the *Court* makes the determination of the appropriate limitations period. ... Thus, the Court is not bound to choose only the particular limitations period advanced by the parties. Rather, the *Court* chooses the applicable period after appropriate analysis, once the issue has been raised. Because defendants raised the Statute of Limitations as a defense immediately, they are free to re-assert that defense in light of the fact that the precedent this Court relied upon has been vacated. See Knoll, supra."[4]

This case simply does not contain facts upon which to consider the questions urged by the Petitioner.

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[4] At footnote 19 of Petitioner's Brief, the Petitioner misrepresents that Springfield Twp. School District in the *Knoll* case, supra, asserted a two-year statute of limitations. The facts indicate that a six-month statute was pled as the lawsuit was filed on April 21, 1981 upon action of the Board of School Directors in July of 1979. Nevertheless, upon remand, although only a six-month statute was pled, the Court, after considering all the circumstances, applied a two-year statute and held the action timely. *Knoll v. Springfield Twp. School District*, 763 F.2d 584 (Third Circuit Court of Appeals 1985).

CONCLUSION

The respondents respectfully request that the petitioner's request for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be denied. The case at bar does not present a factual vehicle to substantiate the issues urged by the petitioner. Furthermore, the Honorable William J. Nealon properly applied the law based on the facts before him which decision was properly upheld by the United States Court of Appeals for the Third Circuit. Respondents respectfully request that petitioner's request be denied.

Respectfully submitted,
FARRELL, FRANK & MATTERN
s/ JOSEPH B. FARRELL
s/ HARRY P. MATTERN
Attorneys for Respondents

Appendix A

APPENDIX A

§11-1127. PROCEDURE ON DISMISSALS; CHARGES; NOTICE; HEARING

Before any professional employe having attained a status of permanent tenure is dismissed by the board of school directors, such board of school directors shall furnish such professional employe with a detailed written statement of the charges upon which his or her proposed dismissal is based and shall conduct a hearing. A written notice signed by the president and attested by the secretary of the board of school directors shall be forwarded by registered mail to the professional employee setting forth the time and place when and where such professional employe will be given an opportunity to be heard either in person or by counsel, or both, before the board of school directors and setting forth a detailed statement of the charges. Such hearing shall not be sooner than ten (10) days nor later than fifteen (15) days after such written notice. At such hearing all testimony offered, including that of complainants and their witnesses, as well as that of the accused professional employe and his or her witnesses, shall be recorded by a competent disinterested public stenographer whose services shall be furnished by the school district at its expense. Any such hearing may be postponed, continued or adjourned. 1949, March 10, P.L. 30, art. XI, §1127.